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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, JOHN F. COPPES, individually and as Director of the Indiana Employment Security Division; VAN SMITH, MAX WRIGHT, and ALBERT SUMMERS, individually and as members of the Indiana Employment Security Board, KENNETH M. SWAIN, individually and as Manager of the Fort Wayne Branch of the Indiana Employment Security Division,

Appellants,

vs.

ESSIE D. BURNEY,

Appellee

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

JURISDICTIONAL STATEMENT

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Appellants,

vs.

ESSIE D. BURNEY,

Appellee

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

JURISDICTIONAL STATEMENT

Appellants (hereafter referred to as the Division) appeal from the Decree and Injunction of the United States District Court for the Northern District of Indiana, sitting as a three-judge court under 28 U.S.C. §§ 2281 and 2284, granting a permanent injunction restraining the Division from terminating, withholding, suspending or reducing the unemployment compensation benefits of any recipient, who has once been determined to be eligible, without a prior due process hearing. Appeal is also taken from the Order

of the District Court denying the Division's subsequent motion to amend that Decree and Injunction.

OPINION BELOW

The Memorandum of Decision, including the Decree and Injunction of the District Court, and the Order of the District Court denying appellants' Motion to Amend have not been reported. They are set out herein in Appendix A.

JURISDICTION

One Ronald M. Hiatt filed suit as a class action against the Indiana Employment Security Division seeking a declatory judgment that a provision of the Indiana Employment Security Act be held unconstitutional and seeking injunctive relief against its enforcement. His complaint recited the grounds of jurisdiction to be 42 U.S.C. § 1983, 42 U.S.C. § 501 et seq., and 28 U.S.C. 2201 and 2202. Appellee Essie B. Burney intervened as plaintiff in that suit, reciting the same jurisdictional basis.

The District Court entered its Memorandum of Decision on October 27, 1971. The Division filed a motion to amend the Decree and Injunction, pursuant to Federal Rules of Civil Procedure, Rules 59(e), 60(b)6, and 65(d), on November 8, 1971, which motion was denied by the District Court on November 29, 1971. The Notice of Appeal was filed on January 3, 1972. That notice is set out in Appendix A.

The basis of the jurisdiction of this Court over this appeal is 28 U.S.C. § 1253, as sustained by the case of *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U. S. 73 (1960).

The Indiana statute involved is Indiana Code of 1971, 22-4-17-2, also found in Ind. Ann. Stat. § 52-1542a (Burns 1964 Repl.). The text of this statute is set out in Appendix B.

QUESTIONS PRESENTED ON APPEAL

1. Whether an unemployed person receiving benefits under the Indiana Employment Security Act, after having been determined to be an insured worker and having been found eligible for benefits for certain weeks, may be determined to be ineligible for benefits for later weeks by reasons of failure to meet eligibility standards during periods after the initial determination, without a "prior due process hearing."

2. If it be determined that such a hearing is required, whether the type of hearing required is a full, adversary, evidentiary hearing or an informal hearing process by which all interested parties are informed of the issues and the alleged facts upon which a determination of ineligibility would be made and are allowed to present such information and explanation as they see fit, but without the formal requisites of a trial-type hearing.

STATEMENT OF THE CASE

On or about January 7, 1971, Appellee Essie B. Burney was determined to be eligible for unemployment compensation benefits as a result of the termination of her previous employment. She received benefits of forty dollars per week until March 26, 1971, at which time her benefits were suspended. During a regularly scheduled interview on March 24, 1971, she informed the Division's claims deputy that she was available only for first shift work. For that reason she was ruled not to have been available for work for the week ending March 27, 1971, and for future weeks until such time as she should enter the labor market and become available for all shifts of work.

On April 27, 1971, Mrs. Burney filed a Motion to Intervene as Plaintiff and Complaint of Intervening Plaintiff in an action previously filed as a class action against the

Division. That action, heard by a three-judge court, had sought to declare invalid the Indiana statutory provision that a recipient found to be eligible by the Division would have his benefits suspended upon an appeal by the employer of that determination. That original issue was decided on the authority of this Court's decision in *California Department of Human Resources Development v. Java*, 402 U. S. 121 (1971), issued while this action was pending in the District Court, and is not an issue on this appeal.

On May 7, 1971, the District Court granted Mrs. Burney a temporary restraining order requiring the division to reinstate her benefit rights and not again suspend or terminate them "without a prior, due process hearing."

Mrs. Burney was granted a hearing before an appeals referee on July 1, 1971, and on July 13, 1971, the referee affirmed the ruling that Mrs. Burney was ineligible. Mrs. Burney then appealed the referee decision to the Review Board of the Division, which on December 6, 1971, after the judgment of the District Court, reversed the referee decision.

On September 21, 1971, Mrs. Burney moved for summary judgment, which motion was granted and judgment entered on October 27, 1971. (See appendix A).

The Division filed on November 8, 1971, a motion to amend the injunction to specify that the type of hearing required be the California determination procedure approved by this Court in *Java*.* A memorandum in opposition to the motion was filed, arguing that a formal, adversary, evidentiary hearing be required. On November 29,

* This Motion, timely filed under Federal Rules of Civil Procedure, Rule 59(e), suspended the time for appeal so that the Notice of Appeal, although filed more than sixty days after the filing of the Memorandum of Decision, was still timely to preserve the right to appeal therefrom. 6A *Moore's Federal Practice*, § 59.12(2) and cases there cited.

the District Court entered an order denying the Division's Motion. (See Appendix A). Notice of Appeal was filed on January 3, 1972. (See Appendix A).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I

An Administrative Determination As To The Eligibility of a Claimant For Benefits Is Permissible.

The District Court in this case declared invalid, as contrary to the Social Security Act, certain provisions of Indiana law which set out the procedures used by the Division to determine the eligibility of claimants for unemployment compensation benefits. That statute, Indiana Code of 1971, 22-4-17-2, is set out in Appendix B.

Under the statute, a person who is unemployed makes an initial claim for benefits, at which time his status as an insured worker is determined. At such time, also, an initial determination of eligibility is made by a claims deputy. The claimant must register for benefits on a weekly schedule thereafter.

The factors determining eligibility may be divided for the present purpose of analysis into two groups. The first deals with the circumstances surrounding the termination of the employment, such as whether the claimant was terminated because of a lack of available work or because of misconduct or whether the termination was voluntary on the part of the claimant. That determination is ordinarily made on the initial claim and not redetermined at that level. Either the claimant or employer, if dissatisfied with the determination, may appeal it to a referee for a full evidentiary hearing.

The other group of issues deal with the claimant's activities during the period of unemployment and must be

redetermined weekly. The greatest number of disputes in regard to these issues arise from the requirements of Indiana Code of 1971, 22-4-14-3, which states in relevant part:

> "An unemployed individual shall be eligible to receive benefits with respect to any week only if he is physically and mentally able to work, is available for work and is found by the Division to be making an effort to secure work."

Other issues to be determined weekly include also the basic question of continued unemployment. The statute provides, in 22-4-17-2(d) (See Appendix B) that the deputy shall determine each week the validity of the claim filed by the claimant for that specific week. A finding of ineligibility for a certain week may, depending on the grounds for the ineligibility, affect only the claim for that specific week or may involve a suspension or revocation of benefit rights for a specific future period.

This Court, in *Java,* supra, dealt with an issue of payment of benefits when an employer appealed a deputy determination favorable to the claimant on the issue of cause of termination of employment. The provision there invalidated provided for automatic suspension, pending that appeal, of all benefits which the claimant had been ruled by the deputy to be eligible for. That provision was held to be in conflict with 42 U.S.C. § 503(a)(1) which requires that provision be made "to insure full payment of unemployment compensation when due."

The District Court relied on *Java* to hold that § 503(a)(1) invalidates the Indiana procedure in the situation of Mrs. Burney's intervening complaint as well as in the original action, which raised the precise *Java* issue. It is here submitted that the decision of the District Court was

error because *Java* is inapplicable to the situation of Mrs. Burney's case.

The specific language of the District Court is as follows:

> "Even though defendants review on a weekly basis the eligibility of a claimant, the court finds that the concept of when benefits are "due" under the Social Security Act does not change from week to week after a claimant has been found eligible and no prior, due process hearing has been held with regard to a subsequent finding of ineligibility. The court thus finds that plaintiff Burney's benefits were "due" and could not be summarily suspended due to a deputy's determination of ineligibility under § 52-1542a(d) [I.C. 22-4-17-2]".

This statement is clearly erroneous as a description of the purpose and provisions of the Indiana Act. Whether or not the "concept" of a claimant's application (whatever that might be) changes from week to week, the claimant's conduct during the period of unemployment might change. The Indiana Act requires that the claimant hold himself available for work and be actively seeking work each week as a condition for eligibility for unemployment compensation benefits for that week. This determination can only be made during the period of unemployment. Thus the District Court erred in treating an initial determination, at least so far as it would apply to issues such as availability and effort to seek work as opposed to the termination issue, as having a continuing force to control or in any way affect later determinations for any other week. It bears repeating at this point that the issue in Mrs. Burney's case was her availability for work.

Neither is the District Court's holding correct as a statement of the purpose of the unemployment compensation provisions of the Social Security Act. As stated in *Java*:

> "Further, providing for 'security during the period following unemployment' was thought to be a means of assisting a worker to find substantially equivalent employment. The Federal Relief Administrator testified that the act 'covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job.' " 402 U. S. 121 at 130. (footnotes omitted).

It is only a logical corrolary that, if the act is intended to free people to look for jobs, a state may enact provisions requiring that they actually use a portion of their time for that purpose.

II

Even Were A Hearing Required, No Formal, Evidentiary, Adversary Hearing Would Be Called For.

The District Court at no time specified what type of hearing was required, making its injunction so vague that the resulting uncertainty of the injunction constitutes reversible error. *Gunn v. University Committee*, 399 U. S. 383 at 388-389 (1970). The Division filed a motion requesting clarification of the requirements intended to be set, but the District Court was either unwilling or unable to do so, denying the motion. Thus, even were the Division not entitled to a plenary hearing by this Court on the issue discussed in Section I hereof, there is an alternate ground for relief here stated.

The language used by the District Court was the requirement of a "prior, due process hearing." Due process, though, does not set up a single, unchanging standard of procedure, but requires a separate determination, as to each type of situation in which the due process requirement

is invoked. *Goldberg v. Kelly,* 397 U. S. 254 (1970); *FCC v. WJR,* 337 U. S. 265 (1949). As stated in the *WJR* case:

> "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. • • • The requirements imposed by that guarantee are not technical, nor is any particular form of procedure necessary." 337 U. S. at 275.

While this brief argument already presented should be sufficient to demonstrate a substantial question of law and that the District Court committed reversible error, some further discussion should help to clarify the issues here involved.

The purported basis of the decision below was the *Java* decision of this Court. That opinion does not use the phrase "prior, due process hearing." The phrase is found, though, in *Goldberg v. Kelly, supra,* which was argued by Mrs. Burney as an alternative basis of decision.

The Division's motion urged that a *Java* type procedure be imposed in this case. That is, the deputy would gather information from all interested parties and from any other available source, notify the parties of the issue to be determined and the information gained from his investigation, and offer opportunity for rebuttal or explanation. No formal "trial" would be held. The deputy would then make his determination on the basis of that information and rebuttal. The Memorandum in Opposition set out a detailed scheme, generally based on *Goldberg,* requiring an evidentiary, adversary procedure as formal as any court trial. An examination of the application of *Java* and *Goldberg* to this situation will demonstrate the practical issues involved.

It was pointed out in Section I, supra, that the determination involved is an *initial* determination of eligibility for

that week and particularly on the issue which was involved in Mrs. Burney's case. Such a determination, under the Indiana procedure, must be made each week for every claim for unemployment compensation benefits filed. Thus the procedure used must, while being full enough to reach a meaningful and rational decision, be summary enough that the whole system does not fall into complete chaos. Provision is made in the Indiana procedure for a full, formal hearing with all the niceties argued by Mrs. Burney to be necessary at a post-termination hearing, as called for by the Social Security Act. 42 U.S.C. § 503(a)(3).

The determination process examined by the Court in *Goldberg* was an extraordinary proceeding in the welfare procedures there involved. The benefit payments there considered, the AFDC program, did not call for frequent periodic redeterminations of eligibility as a prerequisite for receiving benefits. The AFDC program does not require the recipients to carry out any specified activities on a regular basis.

The requirements for continued eligibility differ because the programs were designed to meet different needs, those of the AFDC program being long-term needs and those of unemployment compensation primarily short-term needs. Thus the refusal of the District Court to clarify its injunction, in light of the demand by Mrs. Burney for certain procedures, places the Division on the horns of the dilemma of risking a contempt citation by not following those standards which it knows were presented to the District Court and which therefore might be adopted by the District Court as what it had intended from the beginning, or on the other hand, causing chaos and the complete breakdown of the entire operation by attempting to meet impossible standards.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and set the case for plenary consideration.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

RONALD M. HIATT, ET AL.,
Plaintiffs,
v.
INDIANA EMPLOYMENT SECURITY DIVISION, ET AL.,
Defendants.
Civil No. 70 F 122

MEMORANDUM OF DECISION AND ORDER

This case is now before the court upon a motion for summary judgment filed on July 25, 1971 by plaintiff Ronald M. Hiatt on behalf of himself and a subclass consisting of all present and future unemployed workers who have registered for employment referral with the Indiana Employment Security Division and have been determined to be eligible for unemployment payments therefrom, and whose benefits have been or will be terminated, suspended, withheld, or reduced solely because of the provisions of IND. ANN. STAT. § 52-1542a(e) (Burns 1970 Supp.). The court will also consider the supplemental motion for summary judgment filed September 22, 1971, which seeks summary judgment not only for the plaintiff but also for the intervening plaintiff Burney. The original motion for summary judgment as supplemented by the motion of September 22, 1971 will be considered together in this memorandum of decision. Both plaintiff Hiatt and intervening plaintiff Burney seek summary judgment on their requests for injunctive and declaratory relief as set forth in Hiatt's amended complaint and Burney's intervening complaint. Defendants, the Indiana Employment Security Division

and the director and members thereof and the manager of the Fort Wayne Branch of the Indiana Employment Security Division, have filed no response to the motion for summary judgment. The court will grant plaintiffs' motion for summary judgment in accordance with the provisions of this order.

Plaintiffs bring this action pursuant to 42 U.S.C. § 1983, and jurisdiction is founded upon 28 U.S.C. § 1343. On November 2, 1970, a three-judge United States District Court was convened to hear and determine the action pursuant to 28 U.S.C. § 2284. This is a class action challenging on constitutional and statutory grounds certain provisions of IND. ANN. STAT. § 52-1542a (Burns 1970 Supp.) which is part of Indiana's Employment Security Act. Subsections 52-1542a(a) and (b) provide for a determination by the Indiana Security Employment Division of a claimant's status as an insured worker. Notice of the determination to both the claimant and the employer is provided for, and a hearing on such determination before a referee may be requested by either party. If no hearing is requested, the determination is final and benefits are paid or denied in accordance therewith. IND. ANN. STAT. § 52-1542a(a), (b) (Burns 1970 Supp.). Under § 52-1542a(c), an employing unit, including an employer, having knowledge of facts which may affect an individual's eligibility or right to waiting period credits or benefits shall notify the division of such facts.

The Indiana unemployment compensation scheme provides for the weekly determination, throughout the benefit period, by the deputy of the Division of a claimant's eligibility, the validity of his claims, and the attributability to the employer of the cause for which a claimant left his work. IND. ANN. STAT. § 52-1542a(d) (Burns 1970 Supp.). Under § 52-1542a(d), the deputy *may* refer the claim to a

referee who makes the initial determination with respect to the aforementioned matters in accordance with hearing procedure set forth in IND. ANN. STAT. § 52-1542b (Burns 1964 Repl.).

IND. ANN. STAT. § 52-1542a(e) (Burns 1970 Supp.), provides in pertinent part as follows:

> In cases where the claimant's benefit eligibility or disqualification is disputed, the division shall promply notify the claimant and the employer or employers directly involved or connected with the issue raised as to the validity of such claim, the eligibility of the claimant for waiting period credit or benefits, or the imposition of a disqualification period or penalty, or the denial thereof, and of any nonattributability to the employer of the cause for which the claimant left his work, of such determination and the reasons thereof. . . . [U]nless the claimant or such employer . . . asks a hearing before a referee thereon, such decision shall be final and benefits shall be paid or denied in accordance therewith . . . *In the event that a hearing is requested, the payment of any disputed benefits with respect to the period prior to the final determination or decision shall be made only after such determination or decision. Benefits with respect to any week not in dispute shall be paid promptly regardless of any appeal.* (Emphasis added).

Subsequent to the decision in *California Dep't of Human Resources Dev. v. Java*, 91 S.Ct. 1347 (1971), the court requested a stipulation of facts as to the plaintiff Hiatt which the parties filed on July 13, 1971. The facts of this case, insofar as they relate to plaintiff Hiatt, can be summarized as follows. Plaintiff Ronald M. Hiatt is an adult citizen of the United States and the State of Indiana and resides in New Haven, Indiana. On July 13, 1970, Hiatt applied and was declared eligible for unemployment compensation

benefits by the Fort Wayne Branch of the Indiana Employment Security Division. Hiatt's first unemployment compensation benefits were received on July 29, 1970, and subsequent to the declaration of eligibility, he received four checks, each in the amount of $49.00.

On August 21, 1970, Hiatt accepted part-time employment with the Indiana Janitor Service Company, Inc., as a result of which his weekly benefits for the week ending August 22, 1970 were reduced to $43.00. Prior to the filing of the complaint in this action, Hiatt received his last check in the amount of $43.00 for the week ending August 22, 1970. Hiatt was fired on September 1, 1970 from his job with the Indiana Janitor Service Company, Inc. for alleged misconduct on the job. The Fort Wayne Branch of the Indiana Employment Security Division was advised of the firing on September 2, 1970, and on September 3, 1970 Mr. O. W. Brown, a deputy of the Fort Wayne Branch, determined that Hiatt had been discharged not for misconduct but for dissatisfaction of the employer with the quality of Hiatt's work. Plaintiff thus continued to be eligible for benefits in the amount of $49.00 per week, subject to the employer's right of appeal under § 52-1542a and affirmance on appeal.

The Indiana Janitor Service Co., Inc. appealed the determination of Deputy Brown; consequently, Hiatt's weekly benefit check in the amount of $38.00 for the week ending August 29, 1970 was withheld by defendants. The parties further stipulated that Hiatt's benefits were suspended or withheld pursuant to IND. ANN. STAT. § 52-1542a(e) (Burns 1970 Supp.) and that § 52-1542a(e) does not provide for a hearing prior to suspension or termination of benefits, nor was plaintiff Hiatt afforded a hearing.

On October 29, 1970, a hearing was conducted pursuant to the employer's appeal, and on November 4, 1970, a

referee reversed Deputy Brown's determination. Plaintiff then appealed the referee's reversal, and after a hearing on December 3, 1970, the Review Board entered an order reversing the referee's decision. Hiatt was therefore eligible for all benefits withheld.

The parties further stipulated that defendants are required under § 52-1542a to withhold benefits immediately upon timely request by the employer challenging the defendants' determination of eligibility. Finally, the parties agree that there is a class of people in the State of Indiana who, like Hiatt, have had or will have their unemployment compensation benefits terminated, suspended, withheld, and reduced without a hearing solely because of the requirements of § 52-1542a(e).

The identical issue arises in this action with regard to plaintiff Hiatt which the Supreme Court recently confronted in *Java, supra*: whether a State may, consistent with § 303(a)(1) of the Social Security Act, 42 U.S.C. § 503 (a)(1), suspend or withhold unemployment compensation benefits from a claimant when an employer takes an appeal from an initial determination of eligibility. *Java, supra* at 1349. Following the decision in *Java*, the court concludes that IND. ANN. STAT. § 1542a(e) (Burns 1970 Supp.) conflicts with the requirements of § 303(a)(1) of the Social Security Act which provides in part as follows:

> The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—
>
> (1) Such methods of administration . . . as are found by the Secretary of Labor *to be reasonably calculated to insure full payment of unemployment compensation when due.* . . . (Emphasis added).

The California Unemployment Insurance Code, which was the subject of attack in *Java*, provided, after an eligibility interview and initial determination of eligibility, for automatic suspension of benefits upon an employer's appeal. *Java, supra* at 1352. Indiana's statute similarly suspends payment of benefits after a determination of eligibility upon an employer's appeal, and such a program is not "reasonably calculated to insure full payment of unemployment compensation when due." *Java, supra.* "When due," as used in § 303(a)(1) of the Social Security Act, was intended to mean "at the earliest stage of unemployment that such payments were administratively feasible after giving both the worker and the employer an opportunity to be heard." *Java, supra* at 1354.

> [T]he word "due" in § 303(a)(1), when construed in light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment. Paying compensation to an unemployed worker promptly after an initial determination of eligibility accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes. *Java, supra* at 1355.

The court finds that the critical point in the Indiana procedure is the initial determination of all employee's status as an insured worker and the deputy or referee's initial determination of eligibility. Under § 52-1542a(a), (b), a hearing may be requested by either party regarding defendants' determination of a claimant's status as an insured worker. Under § 52-1542a(d), a deputy makes the weekly determi-

nation of eligibility *unless* he refers to a referee who conducts a hearing. Although the State of Indiana has chosen not to require an interview or hearing on all claims before an interview or hearing on all claims before a determination is made, benefits are "due" when first administratively allowed under § 52-1542a(a), (b), (d). Plaintiff Hiatt was determined to be an insured employee and was found to be eligible, and at that point in the Indiana program, benefits became "due" under § 303(a)(1) of the Social Security Act. Under Indiana's program, the employer and the State are protected, in the event that an initial determination of eligibility is reversed on appeal after benefits have been paid, by IND. ANN. STAT. § 52-1537 (Burns 1964 Repl.), which in part provides for repayment of benefits by an employee and relief for the employer's experience account.

The court thus finds that IND. ANN. STAT. § 52-1542a(e), insofar as it provides for the nonpayment of any disputed benefits with respect to the period prior to the final determination or decision if a hearing is requested, is inconsistent with § 303(a)(1) of the Social Security Act. *Java, supra.*

As previously indicated, the court will also consider the supplemental motion with regard to the intervening plaintiff, Essie B. Burney, and the subclass which she seeks to represent. Based upon the stipulations of fact filed September 21, 1971 and September 29, 1971 and plaintiffs' Request for Admissions filed July 8, 1971 which must be considered as admitted since no timely response was filed, Essie B. Burney is an adult citizen of the United States and the State of Indiana and is a resident of Fort Wayne, Indiana. On January 7, 1971, she applied and was declared eligible for unemployment compensation insurance benefits by defendants, and she received her first benefits late in

January 1971. Her eligibility resulted from employment at the Holiday Inn which had been terminated on December 27, 1970. By notice dated March 26, 1971, plaintiff Burney was advised by a deputy that her benefits were suspended as of the week ending March 27, 1971 because she limited and restricted the hours for which she was available for work. Plaintiff Burney was thus held unavailable for work by the deputy pursuant to § 52-1542a(d) as of the week ending March 27, 1971 and until such time as she entered the labor market and became available for all shifts of work. The deputy's conclusion was based upon Mrs. Burney's failure to accept employment as a dishwasher from 5:00 p.m. to 2:00 a.m. because of transportation difficulties. The benefits were terminated without a prior hearing.

On August 11, 1971, plaintiff Burney moved for a preliminary injunction to prevent defendants from terminating, suspending, withholding, or reducing unemployment compensation benefits without a prior due process hearing. In their memorandum in support of the motion for a preliminary injunction, plaintiffs state that the facts concerning intervening plaintiff Burney and the subclass which, like her, had benefits terminated, withheld, or reduced because of an administrative determination of ineligibility require a constitutional decision based on *Goldberg v. Kelly*, 397 U.S. 254 (1970). On the other hand, plaintiffs contend that plaintiff Hiatt's factual situation presents a "when due" issue controlled by *Java, supra*. However, plaintiffs concede that

> [i]n the alternative, this court could decide that this aspect of the case [the intervening complaint of plaintiff Burney] is also controlled by *Java* and benefits are "due" after a determination of eligibility until such time as a due process hearing is

held and a decision issued finding the claimant no longer eligible.

Plaintiffs seek to establish two subclasses in their class action. First, plaintiff Hiatt allegedly represents a subclass having benefits suspended and withheld because of an employer's appeal after a determination of eligibility. Second, plaintiff Burney allegedly represents a subclass having benefits terminated, withheld, or reduced because of an administrative determination of ineligibility after an original determination of eligibility.

Both plaintiff Hiatt and plaintiff Burney represent a general class of people who have been or will be determined by defendants to be eligible for unemployment compensation benefits, and who have had or will have such benefits terminated, withheld, suspended, or reduced without a prior, due process hearing. The reason for such termination, withholding, or reduction of benefits, whether an appeal by the employer under § 2-1542a(e) or a subsequent weekly determination of ineligibility by a deputy under § 52-1542a(d), does not affect the basis of the court's findings under the facts here presented. Both plaintiffs Hiatt and Burney were determined to be eligible by defendants and were receiving benefits pursuant to Indiana's unemployment compensation program.

Even though defendants review on a weekly basis the eligibility of a claimant, the court finds that the concept of when benefits are due under the Social Security Act does not change from week to week after a claimant has been found eligible and no prior, due process hearing has been held with regard to a subsequent finding of ineligibility. The court thus finds that plaintiff Burney's benefits were "due" and could not be summarily suspended due to a deputy's determination of ineligibility under § 2-1542a (d). Having been found eligible pursuant to the procedures

set forth in § 52-1542a, plaintiff Burney was entitled to benefits until defendants afforded her a hearing. To conclude otherwise would frustrate the purpose of early substitute compensation during unemployment under § 303(a)(1) of the Social Security Act. *See Java, supra* at 1355.

The court makes no finding with regard to those claimants who are initially determined to be ineligible for unemployment compensation benefits without a prior hearing, since no plaintiff is now before the court who was initially determined to be ineligible.

The above holding, based on *Java,* makes it unnecessary to reach the constitutional issue involved in *Goldberg, supra,* and relied upon in *Crow v. California Dep't of Human Resources,* 325 F. Supp. 1314 (N.D.Cal. 1970). The motion for summary judgment is granted.

DECREE AND INJUNCTION

1. It is considered, ordered, adjudged, and declared that IND. ANN. STAT. § 1542a(e) (Burns 1970 Supp.), insofar as it provides that

> [i]n the event that a hearing is requested, the payment of any disputed benefits with respect to the period prior to the final determination or decision shall be made only after such determination or decision

is inconsistent with § 303(a)(1) of the Social Security Act and therefore invalid.

2. It is considered, ordered, adjudged, and declared that the practice of terminating, suspending, withholding, and reducing unemployment compensation benefits without a prior, due process hearing, after a claimant has been previously determined eligible, is inconsistent with § 303(a)(1) of the Social Security Act.

3. Accordingly, the defendants, their successors in office, their agents and employees are enjoined from terminating, withholding, suspending, and reducing the unemployment compensation benefits due plaintiff Hiatt and members of the class solely because of an employer's appeal following a determination of a claimant's eligibility for benefits, whether such determination of eligibility be made at the time of the initial application or pursuant to a decision on appeal, without providing a prior, due process hearing.

4. Further, the defendants, their successors in office, their agents and employees are enjoined from terminating, withholding, suspending and reducing the unemployment compensation benefits of plaintiff Burney and members of the class, who have been determined eligible and subsequently ineligible pursuant to an administrative decision, without a prior due process hearing.

Entered this 27th day of October, 1971.

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

RONALD M. HIATT, ET AL., *Plaintiffs*, v. INDIANA EMPLOYMENT SECURITY DIVISION, ET AL., *Defendants.*	Civil No. 70 F 122

ORDER

On November 8, 1971, the defendants filed a motion with this court seeking an amendment to the decree and injunction heretofore entered by this court on October 27, 1971. On November 16, 1971, plaintiffs filed a memorandum opposing defendants' motion.

This court having considered defendants' motion of November 8, 1971 now denies defendants' motion to amend the decree and injunction of October 27, 1971.

Entered by authority of the entire panel this 29th day of November, 1971.

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

RONALD M. HIATT, ET AL., *Plaintiffs,* v. INDIANA EMPLOYMENT SECURITY DIVISION, ET AL., *Defendants.*	Civil No. 70 F 122

NOTICE OF APPEAL

Notice is hereby given that the Indiana Employment Security Division and each of the defendants in this action hereby appeal to the United States Supreme Court from the Order of this Court of November 29, 1971, refusing to amend that court's decree of October 27, 1971, and from that portion of the court's Memorandum of Decision and Order of October 27, 1971, concerning intervening plaintiff Burney.

APPENDIX B

Indiana Code of 1971, 22-4-17-2

Sec. 2. (a) When an individual files an initial claim the Division shall promptly make a determination of his status as an insured worker, in a form prescribed by the board. A written notice of the determination of insured status shall be furnished him promptly. Each such determination shall be based on and include a written statement showing the amount of wages paid to him for insured work by each employer during his base period and shall include a finding as to whether such wages meet the requirements for him to be an insured worker, and, if so, the week ending date of the first week of his benefit period, his weekly benefit amount, and the maximum amount of benefits that may be paid to him for weeks of unemployment in his benefit period. For the individual who is not insured, the notice shall include the reason for the determination. Unless the individual, within ten (10) days after such determination was mailed to his last known address, or otherwise delivered to him, asks a hearing thereon before a referee, such determination shall be final and benefits shall be paid or denied in accordance therewith.

(b) The Division shall promptly furnish each employer in the base period whose experience or reimbursable account is potentially chargeable with benefits to be paid to such individual with a notice in writing of his benefit liability. Such notice shall contain the date, the name and social security account number of the individual, the ending date of his base period and the week ending date of the first week of his benefit period. Such notice shall further contain information as to the proportion of benefits chargeable to the employer's experience or reimbursable account in ratio to the earnings of such individual from such employer. Unless the employer within ten (10) days after

such notice of benefit liability was mailed to his last known address, or otherwise delivered to him, asks a hearing thereon before a referee, such determination shall be final and benefits paid shall be charged in accordance therewith.

(c) An employing unit, including an employer, having knowledge of any facts which may affect an individual's eligibility or right to waiting period credits or benefits, shall notify the Division of such facts promptly in accordance with regulations prescribed by the board.

(d) In addition to the foregoing determination of insured status by the Division, the deputy shall, throughout the benefit period determine the claimant's eligibility with respect to each week for which he claims waiting period credit or benefit rights, the validity of his claim therefor, and as the case may be the attributability to the employer of the cause for which the claimant left his work, or may refer such claim to a referee, who shall make the initial determination with respect thereto in accordance with the procedure in IC 1971, 22-4-17-3 hereof.

(e) In cases where the claimant's benefit eligibility or disqualification is disputed, the Division shall promptly notify the claimant and the employer or employers directly involved or connected with the issue raised as to the validity of such claim, the eligibility of the claimant for waiting period credit or benefits, or the imposition of a disqualification period or penalty, or the denial thereof, and of any nonattributability to the employer of the cause for which the claimant left his work, of such determination and the reasons thereof. Except as otherwise hereinafter provided in this Subsection regarding parties located in Alaska, Hawaii and Puerto Rico, unless the claimant or such employer within ten (10) days after such notification was mailed to his or its last known address, or otherwise delivered to him or it, asks a hearing before a referee thereon, such decision shall be final and benefits shall be

paid or denied in accordance therewith. With respect to notice of disputed administrative determination or decision mailed or otherwise delivered to the claimant or employer either of whom is located in Alaska, Hawaii or Puerto Rico, unless such claimant or employer within fifteen (15) days after such notification was mailed to his or its last known address or otherwise delivered to him or it, asks a hearing before a referee thereon, such decision shall be final and benefits shall be paid or denied in accordance therewith. If such hearing is denied the request therefor shall be filed with the board in writing within the prescribed periods as above set forth in this Subsection and shall be in such form as the board may prescribe. In the event that a hearing is requested, the payment of any disputed benefits with respect to the period prior to the final determination or decision shall be made only after such determination or decision. Benefits with respect to any week not in dispute shall be paid promptly regardless of any appeal.

(f) No person shall participate on behalf of the Division in any case in which he is an interested party.

(g) Solely on the ground of obvious administrative error appearing on the face of an original determination, and within the benefit year of the affected claims, the Director, or a representative authorized by the Director to act in his behalf, may reconsider and direct the deputy to revise the original determination so as to correct the obvious error appearing therein. Time for filing an appeal and requesting a hearing before a referee regarding the determinations handed down pursuant to this Subsection shall begin on the date following the date of revision of the original determination and shall be filed with the board in writing within the prescribed periods as above set forth in Subsection (c) of this Section.

In the Supreme Court of the United States

Supreme Court, U. S.
FILED
APR 14 1972

October Term, 1971

No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, et. al.,
Appellants,

vs.

ESSIE B. BURNEY,
Appellee.

On Appeal From the United States District Court for the Northern District of Indiana Fort Wayne Division

Motion to Affirm

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Crow v. California Department of Human Resources Development, 325 F. Supp. 1314 (N.D. Cal. 1970) 28, 30, 40, 42, 46, 52
Davis v. Caldwell, 53 F.R.D. 373 (N.D. Ga. 1971) 28
Escalera v. New York City Housing Authority, 425 F. 2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970) 28
Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) 43
Fahey v. Mallonee, 332 U.S. 245 (1947) 43
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Randone v. Appellate Dept., 5 Cal. 3d 536, 96 Cal. Rptr. 709 (1971)	29
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Rosado v. Wyman, 397 U.S. 397 (1970), aff'd after remand, 402 U.S. 991 (1971)	20
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Sherbert v. Verner, 374 U.S. 398 (1963)	24
Security Trust Co. v. Lexington, 203 U.S. 323 (1906)	30
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California Welfare Reform Act of 1971, §24.65, California Welfare and Institutions Code (West. Supp. 1971) §11252.2 12

Indiana Annotated Statutes (Burns 1961 Replacement),
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Indiana Annotated Statutes (Burns 1964 Replacement),
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Administrative Regulations

4 Indiana Administrative Rules and Regulations,
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Indiana Employment Security Division, Unemployment Compensation Claims Manual:
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MISCELLANEOUS AUTHORITIES

Becker, The Inadequacy of Benefits in Unemployment Insurance, In Aid of the Unemployed (1965) 32

California Department of Human Resources Development, Claimants Who Filed Valid New Claims, October 1966-September 1967, Report No. 416, No. 6, (1970) 34

Clague, The Economics of Unemployment Compensation, 55 Yale L.J. 53 (1945) 16, 17

79 Congressional Record (1935) 11

P. Douglas, Standards of Unemployment Insurance (1933) 36

Hearings on H.R. 4120 Before the House Committee on Ways and Means, 74th Cong., 1st Sess. (1935) 11, 13

Hearings on S. 1130 Before the Senate Committee on Finance, 74th Cong. 1st Sess. (1935) 15, 17, 19, 52

Horowitz and Neitring, Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State, 15 U.C.L.A. L. Rev. 787 (1968) 37

H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935) 10, 12, 14, 19

Indiana Employment Security Division, Some Significant Statistics About Unemployment Insurance in Indiana (March (1972) 34, 42, 45

Katoma, et al., Survey of Consumer Finances (1970) 33

P. Klein, Financial Adjustments to Unemployment (1965) 35

New York State Department of Labor, Unemployment Insurance Beneficiaries (March 1970) 34

Note, Charity versus Social Insurance in Unemployment Compensation Laws, 73 Yale L.J. 357 (1963) 12, 52

Note, The Relationship of Unemployment to Mortgage Foreclosures, 86 Monthly Lab. Rev. 1421 (1963) 35

Note, Withdrawal of Public Assistance: The Right to a Prior Hearing, 76 Yale L.J. 1234 (1967) 48

Report to the President of the Committee on Economic Security (1935) 19, 52

Report of the Senate Interim Committee on Unemployment Insurance to the Fifty-Sixth California Legislature (1945) 19

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S. Rep. No. 91-752, 91st Cong., 2nd Sess. (1970) 16
S. Rep. No. 628, 74th Cong., 1st Sess. (1935) 10, 11, 12
Stein, Special Labor Force Report: Work History, Attitudes, and Income of the Unemployed, 86 Monthly Labor Rev. 1405 (1963) 35
Thirty-Sixth Annual Report of the Indiana Employment Security Board, Employment Security in Indiana, 1971 (March 30, 1972) 18, 39, 45, 46
U.S. Bureau of the Census, Statistical Abstract of the U.S. (1970) 33
U.S. Department of Labor Unemployment Insurance Services, Office of State Operations, Guide to Unemployment Insurance Benefits Appeals: Principles and Procedures (1970) 23
U.S. Department of Labor, Unemployment Insurance Statistics (1971) 4, 43

In the Supreme Court of the United States

October Term, 1971

No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, et. al.,

Appellants,

vs.

ESSIE B. BURNEY,

Appellee.

On Appeal From the United States District Court for the Northern District of Indiana Fort Wayne Division

Motion to Affirm

Appellee, pursuant to Rule 16(1)(c) and (d) of the Rules of the Supreme Court of the United States, moves that the judgment of the United States District Court for the Northern District of Indiana be affirmed on the ground that it is manifest that the questions on which the decision of this case depends are so unsubstantial and the decision below is so obviously correct as not to need further argument.

QUESTIONS PRESENTED

1. Whether the Indiana unemployment compensation procedure, which suspends the payment of unemployment compensation benefits to eligible recipi-

ents for several months pending an evidentiary hearing, violates the "when due" requirement of the Social Security Act, 42 U.S.C. § 503(a)(1).

2. Whether the Indiana unemployment compensation procedure, which delays an evidentiary hearing until several months after the suspension of a continued claim recipient's benefits, violates the "fair hearing" requirement of the Social Security Act, 42 U.S.C. § 503(a)(3).

3. Whether this Court's ruling in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) that a state must afford a due process hearing prior to terminating vitally needed governmental benefits applies to the state termination of unemployment compensation benefits, which this Court has found serve "to maintain the recipient at subsistence levels." *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 131-32 (1971).

STATEMENT OF THE CASE

This action was originally filed in the United States District Court by plaintiff Ronald M. Hiatt representing a class of persons who applied for unemployment compensation benefits, were determined eligible for them by the Indiana Employment Security Division (hereinafter the "Division"), and whose benefits subsequently were suspended without a prior evidentiary hearing. The issue presented by plaintiff

Hiatt, whose benefits were suspended pending an employer's appeal regarding his initial eligibility, was identical to the issue decided by this Court in *California Department of Human Resources Development* v. *Java*, 402 U.S. 121 (1971), which held that such suspensions violate the Social Security Act's requirement that state unemployment benefits be paid "when due." 42 U.S.C. § 503(a)(1). The court below ruled in favor of plaintiff Hiatt and his subclass on the basis of *Java*, and the Division has not appealed from that portion of the decision.

This appeal concerns the issues presented by an intervening plaintiff, Essie B. Burney and the subclass she represents, who challenge the suspension of their unemployment benefits pending an evidentiary hearing on the question of their continued eligibility.

Mrs. Burney and her class are wage earners who involuntarily lost their last jobs and have not yet secured new employment.[1] Prior to their recent loss of employment, they earned sufficient wages in employment covered by the Indiana unemployment compensation program to qualify for the receipt of unemployment benefits. They filed unemployment compensation claims and, after a thorough and lengthy investigation by the Division,[2] were determined eligi-

[1] *See* IND. ANN. STAT. §§52-1538a-b, 52-1539 (Burns 1964 Repl., 1971 Supp.).

[2] This procedure is described in detail in California Department of Human Resources Development v. Java, 402 U.S. 121, 125-28 (1971). *See* Indiana Employment Security Division, Unemployment Compensation Claims Manual (hereinafter "Manual") §13000 et. seq.

ble for benefits for a fixed number of weeks. They were then scheduled for periodic interviews, usually at five or ten week intervals, and, thereafter, were regularly paid benefit checks each week.

Sometime later, their benefits were summarily suspended by a Division official. Disputing their suspensions, they requested evidentiary hearings before Division Appeal Referees. IND. ANN. STAT. §52-1542a (e) (Burns 1964 Repl., 1971 Supp.). Between the suspension of their benefits and the decision of the Referee, a period usually lasting many months,[3] payment of unemployment benefits was withheld. When finally afforded an evidentiary hearing, almost 50% were found to have been fully eligible and hence improperly deprived of benefits.[4]

Plaintiff Burney, for example, lost her job in late December 1970. On January 7, 1971, she was initially found eligible for 26 weeks of unemployment benefits beginning January 16, 1971, at the rate of $40.00 per week. In late March, 1971, following her periodic five week continued eligibility interview, her benefits were summarily suspended for an indefinite period. The Division gave the following reason for her suspension:

---

[3]From July-September, 1971, over 82% of claimant appeals were still undecided after 75 days. U.S. Dept. of Labor, Unemployment Insurance Statistics, Table 17 at 10 (Dec., 1971). From July 1970-June 1971, over 56% of claimant appeals were undecided after 75 days. U.S. Dept. of Labor, Unemployment Insurance Statistics, Table 17a at 18 (Sept.-Oct., 1971).

[4]Between July, 1971-September, 1971, over 48% of all appealed decisions terminating eligibility were reversed by Referees. U.S. Dept. of Labor, Unemployment Insurance Statistics, Table 18 at 11 (Dec., 1971).

> Because the claimant is limiting and restricting the hours for which she is available for work, she is being held as not available for work as of week ending 3-27-71 and until such time as she enters the labor market and becomes available for all shifts of work. (Stipulation of Facts, Exhibit A).

The Division's action was based on Mrs. Burney's alleged refusal of a job offer at the Melting Pot Restaurant in Fort Wayne, Indiana. The Division admits that Mrs. Burney was not afforded a due process hearing prior to the termination of her benefits. (Defendants' Response To Request For Admissions, No. 16 at 4).

On April 2, 1971, Mrs. Burney appealed her suspension to a Referee. She contended that she was not obligated to accept the job at the Melting Pot Restaurant because she would have been required to work on the 5 p.m. to 2 a.m. shift; she did not have a car and public buses stopped running at midnight; she had never worked a night shift; she could not find a babysitter for her minor children for such late hours, and she was making an independent effort to secure work on a day shift or earlier night shift.

Faced with the total loss of unemployment compensation during the months pending the decision on her appeal, Mrs. Burney filed a motion to intervene in this action on April 27, 1971. She contended that the Division's practice of suspending unemployment

benefits without a prior evidentiary hearing violated her rights and those of her class under the "when due" and "fair hearing" requirements of the Social Security Act, 42 U.S.C. § 503(a), and the Due Process clause of the Fourteenth Amendment.

On May 7, 1971, the court below granted her motion to intervene and issued a temporary restraining order reinstating her benefits. The court found:

> . . . the continued withholding and termination of unemployment compensation insurance benefits will deprive the intervening plaintiff of the source of income necessary to meet her food, clothing and shelter needs.

On July 1, 1971, a full evidentiary hearing was held on Mrs. Burney's appeal. A Referee decision affirming her suspension was issued on July 13, 1971, some 102 days after she originally filed her request for a hearing. She subsequently appealed to the Division Review Board, and, on December 6, 1971, the Board reversed the Referee, holding that the evidence at the Referee hearing showed her benefits had erroneously been suspended. The Board found that she neither had been unavailable for work nor had turned down a suitable work offer.

On October 27, 1971, the three-judge district court held that the suspension of unemployment benefits without a *prior* evidentiary hearing violated the Social Security Act's "when due" clause. Under the

court's order, unemployment compensation recipients in Indiana are presently afforded the opportunity for an evidentiary hearing prior to the suspension of their benefits.[5]

It is well to clarify at the outset the limited scope of the questions presented herein. As the court below pointed out,[6] this case raises no issue concerning the procedural safeguards to be afforded persons whose initial claims for unemployment benefits have been rejected. The unemployed workers whose rights are here at issue have been thoroughly investigated by the Division[7] and ruled eligible for unemployment benefits for a fixed number of weeks. They have been specifically placed by the Division in a "continued claim" category. *See* Manual, §§13620, 13720-13732. This factual situation is markedly different from that of a claimant whose entitlement to benefits has never been officially established.

---

[5]Indiana's suggestion that the order of the court below requires a full evidentiary hearing for every claimant every week (Jurisdictional Statement [hereinafter "J.S."] at 10), is patently absurd. Under the court's order, an evidentiary hearing is required only for claimants who have been found initially eligible and placed in a "continued claim" category, and who the Division asserts are no longer eligible for benefits.

[6]*See* J.S. at 10.

[7]*See* California Department of Human Resources Development v. Java, 402 U.S. 121, 125-28 (1971).

ARGUMENT

I.

THE SUMMARY SUSPENSION OF UNEMPLOYMENT COMPENSATION BENEFITS FOR SEVERAL MONTHS PENDING AN EVIDENTIARY HEARING VIOLATES THE "WHEN DUE" AND "FAIR HEARING" REQUIREMENTS OF THE SOCIAL SECURITY ACT.

A. Introduction

This Court, like the court below, can decide this case without reaching the constitutional question of whether the Fourteenth Amendment requires a hearing before the suspension of unemployment compensation benefits. *Cf. California Department of Human Resources Development* v. *Java*, 402 U.S. 121 (1971). Indeed, it has long been this Court's practice to first consider statutory issues, for if a statutory basis of decision can be found, delicate constitutional questions need not be reached. *See, Java, supra*, 402 U.S. at 124; *King* v. *Smith*, 392 U.S. 309, 334 (1968); *Greene* v. *McElroy*, 360 U.S. 474, 507-08 (1959); *Wong Yang Sun* v. *McGrath*, 339 U.S. 33, 48-51 (1949).

Section 303(a) of the Social Security Act, 42 U.S.C. § 503(a) provides:

> The Secretary of Labor shall make no certification for payment [of federal funds for administration of state unemployment compensation statutes] to any State unless he finds that the

law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provisions for—

> (1) such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; . . .
>
> (3) opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied.

An examination of the statutory purposes of the unemployment compensation program, as revealed both in the legislative history and judicial interpretation of the Social Security Act, compels the conclusion that, under the "when due" and "fair hearing" requirements, recipients in a continued claim category must be provided with a full opportunity to be heard before the suspension of their benefits. In enacting the unemployment compensation program, Congress sought to achieve three principal purposes: (1) providing sustenance and security to unemployed workers without relegating them to public assistance; (2) helping unemployed workers to find employment substantially equivalent to their former jobs; and (3) maintaining the purchasing power of the un-

employed, thereby stabilizing consumer demand and sustaining the economy. *See generally California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 130-33 (1971). To achieve its purposes, Congress must have intended a hearing procedure that insures that payments are made to workers at a time in their unemployment cycle when these goals would be facilitated rather than frustrated.[8] For this end to be accomplished, payments must not only commence promptly when a worker is unemployed, *see Java, supra*, they must also continue throughout the period of unemployment until such time as he is found after a full hearing to be no longer eligible for them.

B. The Summary Suspension of Benefits Defeats the Congressional Objectives of the Unemployment Compensation Program.

1. *The summary suspension of benefits forces eligible recipients to rely on welfare for sustaining funds.* The chief purpose of the unemployment compensation program was to "provide cash to a newly unemployed worker at a time when otherwise he would have nothing to spend, serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." *Java, supra*, 402 U.S. at 131-32; *see generally*, H. R. REP. No. 615, 74th Cong., 1st Sess. 7 (1935); S. REP. No. 628, 74th Cong., 1st Sess. 12 (1935). Thoroughly

[8]Indeed, Indiana specifically recognizes in its Jurisdictional Statement that the unemployment compensation program is designed to meet "primarily short term needs" of unemployed workers. (J.S. at 10)

familiar with the plight of workers "thrown out of work suddenly,"[9] Congress sought to alleviate the pressing need for "security during the period following unemployment." S. REP. NO. 628, *supra*. However, because of the stigma attached to relief and charity, welfare was believed to be an inappropriate means of sustaining workers during temporary periods of unemployment. As was brought out on the House Floor by the Chairman of the Ways and Means Committee:

> The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of the population and its loss of self-respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon the previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief. 79 CONG. REC. 5468 (1935) (remarks of Representative Doughton).

Congress not only viewed welfare as imposing a stigma on unemployed workers, it doubted that welfare, with its reliance upon general tax revenues which fluctuate with the state of the economy, could adequately provide large numbers of workers with sustenance during a period of economic downturn. *See Steward Machine Co.* v. *Davis*, 301 U.S. 548,

[9] *See Hearings on H.R. 4120 Before the House Comm. on Ways and Means*, 74th Cong., 1st Sess., 214 (1935) (statement of Harry L. Hopkins).

586-87 (1937); Note, *Charity versus Social Insurance in Unemployment Compensation Laws*, 73 YALE L.J. 357, 359 (1963). In order to reduce the burden on local welfare rolls during periods of economic crisis and "very materially reduce the cost of relief in future years,"[10] the Employment Security Fund was designed to accumulate reserves in times of economic prosperity. *See* H. R. REP. No. 615, 74th Cong., 1st Sess. 7 (1935).[11]

In order for unemployment compensation to provide workers "security during the period following unemployment," *Java, supra* 402 U.S. at 132, and thereby "to replace [relief] in large part," H. R. REP. No. 615, 74th Cong., 1st Sess. 7 (1935), benefit payments must continue throughout the period for which the unemployed worker has been found eligible. A substantial interruption in the payment of benefits increases the number of unemployed workers who are either left without any income whatever or are forced to turn to relief. By summarily suspending

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[10]S. REP. No. 628, 74th Cong., 1st Sess. at 12.

[11]Recent events have substantiated Congress' belief that state welfare systems cannot adequately deal with the economic dislocations caused by a severe period of unemployment. For example, in enacting emergency welfare legislation in 1971 to relieve the drain on welfare funds caused by unemployment, the California Legislature declared:

> The Legislature hereby finds that the high rate of unemployment, which has been aggravated in California's most populous regions by layoffs in the aerospace industries, has led to a high level of public assistance grants. . . . The Legislature further notes that increasing state taxes will have a depressing effect upon those individuals, firms, and industries now operating at a marginal level and will tend to further aggravate the unemployment rate and increase the welfare rolls. . . . The Legislature finds, therefore, that the most compelling state interest requires that the relationship between welfare and unemployment be recognized. Welfare Reform Act of 1971, §24.65, CAL. WELF. & INST. CODE §11252.5 (West Supp., 1971).

recipients' benefits and postponing evidentiary hearings regarding their continued eligibility for several months, the Division undermines the Congressional purpose of "maintain[ing] the recipient at subsistence levels without the necessity of his turning to welfare or private charity." *Java, supra*, 402 U.S. at 131-32.

2. *The summary suspension of benefits renders eligible workers less able to find substantially equivalent employment.* Unemployment insurance was established by Congress "as a means of assisting a worker to find substantially equivalent employment." *Java, supra*, 402 U.S. at 132. In explaining to the House Ways and Means Committee why the draftsmen of the Social Security Act chose to pay unemployment benefits, a member of the President's Committee on Economic Security pointed out:

> This [the Act] covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job. We felt that in that period of 2½ to 3 months the beneficiaries should get an insurance benefit in cash. *Hearings on H.R. 4120 Before the House Committee on Ways and Means*, 74th Cong., 1st Sess. 214 (1935) (statement by Harry L. Hopkins, Federal Emergency Relief Administrator).

If labor is able to flow from pockets of unemployment to areas where jobs are available, employment

becomes more stabilized and the supply and demand mechanism in the labor market operates more efficiently. But the ability of a worker to find substantially equivalent employment is severely undercut when funds which may be used to purchase transportation for job interviews are terminated for several months during the period in which he is unemployed. The funds that might have been used to increase labor mobility may instead have to be spent on basic necessities. *Cf. Goldberg* v. *Kelly*, 397 U.S. 254, 264 (1970). Thus, to the extent that payments are delayed, the opportunity to find employment is diminished, which in turn often lengthens the period in which a recipient must rely on unemployment benefits for support. By summarily suspending payments pending an evidentiary hearing, only to reinstate them many months later, the Division is often responsible for a greater withdrawal from the Employment Security Fund than if payments were made in their regular course during the initial stages of unemployment.

3. *The summary suspension of benefits reduces the purchasing power of the unemployed.* Both the national economy and the unemployed worker benefit when purchasing power is maintained throughout periods of high unemployment. Congress viewed unemployment compensation as "a measure intending to maintain purchasing power, upon which business and industry are dependent." H. R. REP. No. 615,

74th Cong., 1st Sess. 7 (1935); *see generally, Java, supra*, 402 U.S. at 132-33. During the period in which they receive no compensation, unemployed workers are to a great extent inhibited from spending money on consumer goods. Declining consumption leads to a decrease in production by business firms, which in turn causes further unemployment, and eventually, economic depression. On the other hand, maintenance of purchasing power, through a steady flow of unemployment benefits commencing soon after unemployment occurs, contributes to the stability of the overall economic situation. As Senator Wagner, sponsor of the Social Security Act, pointed out to the Senate Committee on Finance:

> The chief merit of unemployment insurance, however, is that it will exert a profound influence upon the stabilization of industry. . . . The transfer of purchasing power by benefit payments when danger threatens will float the business ship off the shoals of depression to the security of prosperity. *Hearings on S. 1130 Before the Senate Committee on Finance*, 74th Cong., 1st Sess. 2 (1935).[13]

[13]Similarly, Frances Perkins, Secretary of Labor and Chairman of the President's Committee on Economic Security, which drafted the Social Security Act, testified:

> We have also by observation of the condition of other countries having a modest scheme of unemployment insurance, come to a recognition that the small merchants of a locality, and those who provided them with their stock, had derived a benefit because persons out of work continued to buy the necessities of life and therefore helped to make a market for the whole community. That, of course, in its own turn, has a very definite and advantageous effect upon employment in other lines than in that first depressed. *Hearings on S. 1130 Before the Sen. Comm. on Finance*, 74th Cong., 1st Sess., 111 (1935).

Thirty-five years later, in reporting the Federal-State Extended Unemployment Compensation Act of 1970 (Public Law 91-373), the Senate Committee on Finance reiterated the vital role of unemployment benefits in maintaining economic stability:

> In periods of economic recession, when substantial numbers of workers in a State or in the Nation experience unemployment which extends beyond the periods for which they are protected under current State laws, the resulting uncompensated unemployment may have a serious impact not only upon the workers and their families, but on the purchasing power and economic health of the entire Nation. S. REP. NO. 91-752, 91st Cong., 2nd Sess. (1970), U.S. CODE CONG. AND AD. NEWS at 3635.

For the maintenance of purchasing power to be achieved, it is necessary that unemployment benefits be paid throughout the critical period of unemployment—not in lump sum form, long after unemployment has ceased. Payments must *regularly* be made "early in the downturn, immediately after unemployment makes its appearance." *See* Clague, *The Economics of Unemployment Compensation*, 55 YALE L.J. 53, 69 (1945). Uninterrupted payments enable workers and their families

> to preserve existing assets, such as homes, furniture, and automobiles, thus avoiding the forced liquidation of assets which aggravates the downturn in business. They encourage more

> confident spending of other resources, thus helping to avoid a "freezing" of purchasing power on the part of millions of workers when they are faced with unemployment. Clague, *supra*, 55 YALE L.J. at 69.[13]

Whereas lump sum payments may be spent erratically, a steady weekly income assures that "these funds are ordinarily spent for the basic necessities of life and furnish purchasing power for the products of our basic industries such as agriculture, food, and clothing." *Id.*

By interrupting the steady stream of benefit payments to unemployed workers for several months, the summary suspension of unemployment compensation frustrates the Social Security Act's objective of stabilizing the economy by maintaining the purchasing power of the unemployed. *Cf. Java, supra*, 402 U.S. at 132-33.

C. By Suspending Unemployment Benefits for Several Months Pending a Hearing on Continued Eligibility, the Division Fails to Insure the Full Payment of Unemployment Compensation "When Due."

Section 303(a)(1) of the Social Security Act provides that state unemployment compensation programs must "be reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1). In *California Department of*

[13]Unemployment compensation is "specially earmarked for the use of the unemployed at the very times when it is best for business that [it] should be so used." Statement of Senator Robert F. Wagner, *Hearings on S. 1130 Before the Sen. Comm. on Finance*, 74th Cong., 1st Sess., 2 (1935).

Human Resources Development v. *Java*, 402 U.S. 121, 133 (1971), this Court found that under this provision of the Act, unemployment benefits become "due" after the *initial* eligibility determination—"the critical point in the [unemployment compensation] procedure." 402 U.S. at 127. Based upon this finding, the Court held unlawful the summary suspension of an unemployed worker's benefits pending an employer's appeal. Since the summary suspension of benefits frustrated the Congressional objective of providing "early substitute compensation during unemployment," the Court held that it violated the Social Security Act's "when due" requirement. 402 U.S. at 133.

The continued claim recipients in this case, like the recipients in *Java*, have been found initially eligible for benefits for a fixed number of weeks, yet they receive no benefits pending a Referee's hearing on their continued eligibility. If found to be still eligible (as almost 50% are),[14] their benefits will be paid to them retroactively in a lump sum many months later, when they may no longer be unemployed. Indeed, in 1971 the average length of time an unemployed worker in Indiana received unemployment benefits was eleven weeks. THIRTY-SIXTH ANNUAL REPORT OF THE INDIANA EMPLOYMENT SECURITY BOARD, EMPLOYMENT SECURITY IN INDIANA 1971 at 55 (March 30, 1972) (hereinafter "*Annual Report*").

[14] *See* n. 4, *supra*.

Since over 82% of appealed suspensions were not decided within eleven weeks (75 days),[15] the overwhelming majority of suspended recipients received benefits at a time when they no longer qualified for *current* payments. Thus, in the event his benefits are summarily suspended, an *eligible* worker may receive no weekly benefits when he is unemployed and in desperate need of income,[16] only to receive a lump sum payment when he is already back at work.

The Division concedes that unemployment benefits are designed to meet "primarily short-term needs." (J.S. at 10). However, the Division's own statistics reveal that the Indiana scheme does not result in making payments during the "limited period" between jobs which Congress intended unemployment benefits to cover. H.R. REP. No. 615, 74th Cong., 1st Sess. at 7 (1935); REPORT TO THE PRESIDENT OF THE COMMITTEE ON ECONOMIC SECURITY, *Hearings on S. 1130 Before the Senate Committee on Finance*, 74th Cong., 1st Sess. at 1321-22 (1935).[17] Since the suspension of benefits pending an evidentiary hearing *systematically* denies "early substitute compensation during unemployment" to eligible unemployed workers, it frustrates the fundamental objectives of the Social Security Act, and, as the court below found, is

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[15] See n. 3, *supra*.

[16] See pp. 30-39, *infra*.

[17] As a California legislative study pointed out:

> It has always been conceded that the purpose of an unemployment insurance program is to provide benefits when unemployed and not four or five weeks thereafter. REPORT OF THE SENATE INTERIM COMMITTEE ON UNEMPLOYMENT INSURANCE TO THE FIFTY-SIXTH CALIFORNIA LEGISLATURE, 62 (1945).

not "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. §503(a)(1).

Faced with an identical summary suspension procedure but a much shorter period of delay pending the Referee decision, a three-judge district court in *Wheeler* v. *Vermont*, 335 F. Supp. 856 (D. Vt., 1971), reached the same conclusion as the court below and held that the procedure violated the Social Security Act. As Judge Oakes stated:

> We thus face the question whether this procedure falls without the federal statutory mandate of §303(a)(1) of the Social Security Act, 42 U.S.C. § 503(a)(1), that the state method of administration be "reasonably calculated to insure full payment of unemployment compensation when due." *See California Department of Human Resources* v. *Java, supra; cf. Rosado* v. *Wyman*, 397 U.S. 397, 420-21 (1970), *aff'd after remand*, 402 U.S. 991 (1971); *King* v. *Smith*, *supra* at 317, 333. The evidence here shows that on the average it takes approximately 37.5 days from a time a claimant appeals from a Claim Examiner's determination until the Appeal Referee's decision is rendered. This delay alone would be enough to warrant a finding that the procedure as we have above described it is not "reasonably calculated" to produce full payment "when due." 335 F. Supp. at 861. *Contra Torres* v. *New York State Dept. of Labor*, 321 F. Supp. 432 (S.D.N.Y. 1971)

(three-judge court), *vacated*, 402 U.S. 968, *judgment reinstated*, 333 F. Supp. 341, *aff'd*, ... U.S. .... (1972), 40 U.S.L.W. 3415.

The Division urges that benefits are only "due" each week since each week constitutes a "new" eligibility determination. Both the Division's terminology and its practice belie this contention. After an employed worker has been found eligible for a fixed number of weeks following an exhaustive initial eligibility investigation, *see Java, supra*, 402 U.S. at 125-128, he is placed by the Division in a "continued claim" category. Manual §§ 13720-13732. Thereafter, he ordinarily is personally interviewed to check whether he has maintained his continued eligibility, not every week, but only at *five* or *ten* week intervals, depending on his category.[18]

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[18]Section 13720 of the Manual provides that continued claim recipients be placed in one of three categories:

Group A: Those claimants who have shown [in their initial eligibility investigation] a firm attachment to the labor market;

Group B: Those claimants [who] . . . need further clarification or who . . . are classified temporarily until placed in the A or C groups;

Group C: Those claimants who do not show a firm attachment to the labor market and who present problems of reemployment.

Unemployed workers placed in Group A are defined as:

Those claimants [who] . . . have had employment with one employer or have been in a regular occupation for a long enough period of time to indicate that they want to obtain suitable work as soon as it can be found. Manual §13723.

Group A workers are interviewed only once every *ten* weeks in a "special interview" whose purpose "is to determine whether or not the claimant shall continue in Group A." Manual § 13725.

Group C workers are defined as: "Those claimants [for whom] . . . there are likely to be continuing questions of ability to work or availability. . . ." Even Group C workers (those who are deemed likely to present questions concerning the maintenance of their continued eligibility) ordinarily are informally interviewed only once every *five* weeks. Manual §13727.

In addition to reporting for interviews every five or ten weeks, the recipient must come in to the Employment Security Office each week to fill out a voucher for his weekly check. In signing the voucher, he certifies whether he "work[ed] anywhere last week [and] if so, what were [his] earnings?" and whether he "refuse[d] an offer of work?" The Manual points out that in "accepting the voucher" "it is unnecessary [for the clerk] to question the claimant in detail . . . with respect to each certification." Manual § 13620.

If his continued eligibility is questioned, his benefits are suspended not only for one week, but for many weeks and often for an indefinite period.[19]

As the court below properly found, benefits are continuously "due" continued claim recipients throughout their fixed period of eligibility:

> . . . the court finds that the concept of when benefits are due under the Social Security Act does not change from week to week after a claimant has been found eligible and no prior, due process hearing has been held with regard to a subsequent finding of eligibility. . . . The court thus finds that plaintiff Burney's benefits were "due" and could not be summarily suspended due to a deputy's determination of ineligibility under §2-1542a(d). Having been found eligible pursuant to the [initial eligibility determination procedure], plaintiff Burney was entitled to benefits until defendants afforded her a hearing. To conclude otherwise would frustrate the purpose of early substitute compensation during unemployment under § 303 (a) (1) of the Social Security Act. *See Java, supra*, 402 U.S. at 133-35. (J.S., Appendix A at 9-10).

D. By Delaying a Hearing Until Several Months After the Suspension of Benefits, the Division Violates the "Fair Hearing" Requirement of the Social Security Act.

The Social Security Act requires that the Division

[19] *See* IND. ANN. STAT. §52-1540 (Burns 1964 Repl.) (permanent termination for alleged misstatement); IND. ANN. STAT. §52-1538b (Burns 1964 Repl., 1971 Supp.) (indefinite suspension for alleged continuing unavailability for work); IND. ANN. STAT. § 52-1539a (Burns 1964 Repl., 1971 Supp.) (suspension for alleged refusal of suitable work: (a) for benefit periods established before July 3, 1971—until claimant earns not less than ten times his weekly benefit amount, and thereafter, a 25% reduction in benefits; (b) for benefit periods established subsequent to July 3, 1971—for five consecutive calendar weeks or until claimant earns at least six times his weekly benefit amount, and thereafter, a 25% reduction in benefits).

afford a "fair hearing" to unemployment compensation recipients whose benefits it seeks to suspend. 42 U.S.C. §503(a)(3). While the elements of a "fair hearing" are not specified within the Act itself, the hearing must be held "at a meaningful time and in a meaningful manner." *Cf. Boddie* v. *Connecticut*, 401 U.S. 371 (1971); *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).[10]

With regard to continued eligibility for unemployment compensation, only a hearing held *before* benefits are suspended meets the Act's "fair hearing" requirement, for only a prior hearing insures the regular flow of benefits to eligible workers—which "is what the Unemployment Insurance Program is all about." *Java, supra*, 402 U.S. at 135.

The Division urges that the post-termination Referee hearing fulfills its "fair hearing" obligation under the Act. (J.S. at 10).[11] However, by delaying

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[10]The "manifest purpose" of the statutory command that a "fair hearing" be held is to afford aggrieved parties procedural protections which are least equivalent to those required by due process. Shields v. Utah-Idaho Central Ry. Co., 305 U.S. 177, 182 (1938); *see also* Philadelphia Co. v. Securities and Exchange Commission, 197 F.2d 808, 817 (D.C. Cir. 1949), *vacated as moot*, 337 U.S. 901 (1949).

[11]In so doing the Division evidently recognizes that its five week "periodic interview" and ten week "special interview" cannot be considered "fair hearings" within the meaning of the Act. As the United States Department of Labor has stated:

> Hearings must be fair, and they must therefore be conducted in accordance with procedural safeguards. The essential requisites of fairness, although expressed in many ways, include the following elements which have been excerpted from case law: "timely notice to all claimants of every material step in the proceedings; . . . to hear the evidence against him and to know the claims of his opponent; . . . to cross-examine witnesses; . . . that the Decision of the Board shall be governed by and based upon the evidence produced at the hearing . . . ." U.S. Department of Labor Unemployment Insurance Services Office of State Operations, GUIDE TO UNEMPLOYMENT INSURANCE BENEFITS APPEALS: PRINCIPLES AND PROCEDURES 2-3 (1970).

The Division's informal interviews do not provide these safeguards.

this hearing until several months after the suspension of a continued claim recipient's benefits, the Division fails to provide a hearing at a meaningful stage in the unemployment compensation cycle. Large numbers of eligible recipients are thereby deprived of "early substitute compensation during unemployment." *Java, supra,* 402 U.S. at 133. The Division's failure to provide a pre-termination hearing directly contravenes the Congressional purposes of (1) providing sustenance and security to unemployed workers without relegating them to welfare; (2) helping workers in their search for new employment; and (3) maintaining the purchasing power of the unemployed through the continuous payment of benefits, and thus violates the fair hearing requirement of the Social Security Act. 42 USC 503(a)(3).

II.

THE SUMMARY TERMINATION OF UNEMPLOYMENT BENEFITS FOR SEVERAL MONTHS PENDING A REFEREE HEARING VIOLATES DUE PROCESS SINCE THE SEVERE ECONOMIC HARDSHIP IMPOSED ON ELIGIBLE RECIPIENTS OUTWEIGHS THE GOVERNMENTAL INTEREST IN SUMMARY ADJUDICATION.

A. Due Process Requires an Evidentiary Hearing Prior to the Termination of Unemployment Benefits.

The framework for considering the requirements of procedural due process[23] was set forth by this Court

[23]It is beyond dispute that procedural due process is applicable to the Division's actions in terminating unemployed benefits. As this Court held in Sherbert v. Verner, 374 U.S. 398 (1963) and specifically reaffirmed in Goldberg v. Kelly, 397 U.S. 254, 262 (1970): "Relevant constitutional restraints apply . . . to disqualification for unemployment compensation."

in *Goldberg* v. *Kelly*, 397 U.S. 254, 262-63 (1970), a case that dealt with welfare terminations but otherwise is identical to the case *sub judice:*

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication [citation omitted].

After weighing the interests of the recipients and the State, this Court held in *Goldberg, supra,* and its companion case, *Wheeler* v. *Montgomery,* 397 U.S. 280 (1970), that procedural due process requires an evidentiary hearing *before* welfare payments may be discontinued or suspended. This Court further ruled that the pre-termination hearing must contain the fundamental elements of "rudimentary due process," including timely and adequate notice detailing the reasons for a proposed termination, the right to appear personally and through counsel, an opportunity to present evidence and confront and cross-examine adverse witnesses, and the right to a decision by an impartial decision-maker based solely on the rules and evidence adduced at the hearing. *Goldberg* v. *Kelly, supra,* 397 U.S. at 267-71.

The language of the *Goldberg* opinion indicates that a prior hearing is also required before unemployment benefits may be terminated. In holding that

welfare benefits may not be terminated without a prior hearing, this Court specifically cited a case dealing with unemployment compensation terminations—*Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967)—for the proposition that the loss of governmental benefits such as welfare may cause severe personal deprivation.[23] Thus, in distinguishing the termination of welfare benefits on the basis of need from the termination of such other government entitlements as contracts, employment, and tax exemptions, 397 U.S. at 264, the Court in *Goldberg* recognized that similar need is present in the termination of unemployment benefits.

The Division urges that *Goldberg* is inapplicable because of an alleged distinction between the "weekly" eligibility of unemployment compensation recipients and the "continued eligibility" of welfare recipients. (J.S. at 10). To support this distinction, it contends that, unlike unemployment compensation recipients, welfare recipients are not required "to carry out any specified activities on a regular basis." (J.S. at 10). As demonstrated below, no such distinction may properly be drawn.

The procedure for awarding continuing unemployment benefits does not differ significantly from that used with respect to welfare. In both programs, re-

[23]This Court stated in *Goldberg:* "For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. *Cf.* Nash v. Florida Industrial Commission, 389 U.S. 235, 239 (1967)." 397 U.S. at 264.

cipients begin receiving regular benefits after an initial eligibility investigation, and thereafter are required to make periodic reports concerning their continued eligibility. An unemployment compensation recipient who has been found initially eligible for benefits is placed by the Division in a "continued claim" category and must report for an "interview" to review his status only once every five or ten weeks. Manual §§13725, 13727.[14] Welfare recipients likewise undergo periodic eligibility reviews, and are further responsible for immediately notifying the County Welfare Department of any change of circumstances which may affect continued eligibility, including changes in living arrangements, income, property, composition of the household, or the school status of their children. Indiana Public Assistance Manual, Chapter XI-A-1 & 2. Should questions arise concerning their continued eligibility, both unemployment compensation and welfare recipients are liable to have their benefits suspended indefinitely.[15]

Both welfare and unemployment compensation recipients must perform regular duties to maintain their continued eligibility. Unemployment compensation recipients must, for example, seek work, be available for work and report any change in status or income. IND. ANN. STAT. §52-1538b (Burns 1964 Repl., 1971

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[14]To receive his check, an unemployment compensation recipient must also turn in a weekly payment voucher. Manual §§13600, 13610, 13620. In some instances the voucher can be "executed" by mail. Manual §13628.

[15]*See* n. 19, *supra*.

Supp.); §52-1540 (Burns 1964 Repl.). Welfare recipients similarly may be required to accept employment, undergo job training (IND. ANN. STAT. §52-1241a (Burns 1964 Repl., 1971 Supp.); 4 IND. ADMIN. RULES & REGS. § (52-1244)-2 (Burns 1967, 1971 Supp.)), seek other sources of income (*see, e.g.*, Indiana Public Assistance Manual, Chapter III-C-15, Chapter IV-B-21), and report any changes in status or income. (Indiana Public Assistance Manual, Chapter XI-A-1 & 2).

The identical distinction between welfare and unemployment benefits urged by the Division in this case was soundly rejected in *Crow* v. *California Department of Human Resources Development*, 325 F. Supp. 1314, 1319 (N.D. Cal. 1970). Holding that, under *Goldberg* v. *Kelly*, *supra*, unemployment benefits may not be terminated without a prior evidentiary hearing,[28] the court stated:

> Welfare and unemployment compensation schemes both involve an initial decision *re* eligibility, followed by periodic determinations

[28] *Accord* Wheeler v. Vermont, 335 F. Supp. 856 (D. Vt. 1970) (three-judge court); Java v. California Department of Human Resources Development, 317 F. Supp. 825 (N.D. Cal. 1970) (three-judge court), *aff'd on statutory grounds*, 402 U.S. 121 (1971); Torres v. New York State Department of Labor, 321 F. Supp. 432, 438 (S.D.N.Y. 1971) (three-judge court) (Lasker, J.) (dissenting opinion). *Contra* Torres v. New York State Dept. of Labor, 321 F. Supp. 432 (S.D.N.Y. 1971) (three-judge court), *vacated*, 402 U.S. 968, *judgment reinstated*, 333 F. Supp. 341, aff'd, ... U.S. ..... (1972), 40 U.S.L.W. 3415.

Prior due process hearings have also been required in other areas closely related to the termination of welfare and unemployment benefits. *See e.g.*, Escalera v. New York City Housing Authority, 425 F. 2d 853 (2nd Cir.), *cert. denied*, 400 U.S. 853 (1970) and Caulder v. Durham Housing Authority, 433 F. 2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971) (evictions from public housing); Davis v. Caldwell, 53 F.R.D. 373 (N.D. Ga. 1971) (three-judge court) (termination of workmen's compensation benefits).

> that the applicant's circumstances have not changed in such a way as to affect that first decision.[17]

Far from being confined to welfare, the principles enunciated in *Goldberg* v. *Kelly*, *supra*, are supported by a host of recent decisions of this Court, which firmly establish that a prior due process hearing is required *before* the imposition of serious personal loss. In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), the harm caused a wage earner by the partial loss of his paycheck was held sufficient to require a due process hearing prior to the garnishment of wages.[18] In *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971), where the "posting" of an individual as an excessive drinker damaged his reputation and integrity, this Court stated:

> . . . the right to be heard before being condemned to suffer grevious loss *of any kind*, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society [citation omitted, emphasis added].

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[17]Surely the result in *Goldberg* would not have been different if the welfare department involved therein had employed identical procedures, but simply had used a different terminology labelling its periodic review of eligibility a "new eligibility determination." As this Court stated in Bell v. Burson, 402 U.S. 535, 541 (1971), "in reviewing state action in this area [of procedural due process] . . . we look to substance, not to form, to determine whether constitutional minimums have been honored."

[18]Lower courts have applied the *Sniadach* rationale to a variety of related situations. *See, e.g.*, Larson v. Fetherston, 172 N.W. 2d 20 (Wisc. Sup. Ct. 1969) and Randone v. Appellate Department, 5 Cal. 3d 536, 96 Cal. Rptr. 709 (1971) (funds deposited in a bank may not be attached without a prior hearing); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) and Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970) (innkeeper's lien laws held unconstitutional for failure to provide a prior hearing).

In *Bell* v. *Burson*, 402 U.S. 535, 542 (1971), a unanimous Court held that the termination of a driver's license, which frequently is a prerequisite for a worker's transportation to his job, necessitates a prior hearing, since:

> it is fundamental that except in emergency situations (and this is not one) due process requires that when a state seeks to terminate an interest such as that here involved, it must afford notice and an opportunity for hearing appropriate to the nature of the case *before* the termination becomes effective [footnote and citation omitted].

As the court stated in *Crow* v. *California Department of Human Resources Development*, 325 F. Supp. 1314, 1318 (N.D. Cal. 1970), "it is clear that a predetermination hearing . . . *is the constitutional norm, and not the exception*, . . ."[19]

B. The Summary Termination of Unemployment Benefits Imposes Severe Economic Hardship on Eligible Recipients.

At the very inception of the unemployment compensation program, this Court emphasized the singular importance of unemployment benefits in staving off the "evils of the attendant social and economic wastage" caused by unemployment. *Carmichael*

[19] *See also* Armstrong v. Manzo, 380 U.S. 545 (1965); Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941); Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292 (1937); Southern Railway Co. v. Virginia, 290 U.S. 190, 196 (1933); Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915); Security Trust Company v. Lexington, 203 U.S. 323 (1906); Hovey v. Elliot, 167 U.S. 409 (1897); Windsor v. McVeigh, 93 U.S. 274 (1876).

v. *Southern Coal and Coke Co.*, 301 U.S. 495, 516 (1937). Thirty years later in *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967), a unanimous Court pointed out that the improper termination of unemployment benefits for a substantial period would cause an unemployed worker to "risk financial ruin." 389 U.S. at 239. In the words of Mr. Justice Black:

> Even the hope of a future award of back pay may mean little to a man of modest means and heavy responsibilities faced with the immediate severance of sustaining funds. *Id.*

As recently as last term, this Court reiterated the "obvious" importance of unemployment compensation to the newly unemployed worker, since it provides cash "at a time when otherwise he would have nothing to spend." *California Department of Human Resources Development* v. *Java*, *supra*, 402 U.S. at 125, 132.

The unemployment compensation system is part of the 1935 Social Security Act's comprehensive scheme of providing for the general welfare of all Americans during a period when they might otherwise be subject to severe economic deprivation. *See Helvering* v. *Davis*, 301 U.S. 619, 641-45 (1937); *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 586-87 (1937). Unemployment benefits serve to maintain involuntarily unemployed workers and their families

at a time when they have lost their source of income. Although providing greater dignity and security, they were intended to be complementary in nature and design to the Social Security Act's welfare programs for sustaining the blind, disabled, young and aged. *See Java, supra; King* v. *Smith*, 392 U.S. 309, 327-33 (1968).

Thus, while the unemployment compensation system is financed under insurance principles, "the insurance technique is a means to the welfare end." Becker, *The Inadequacy of Benefits in Unemployment Insurance*, IN AID OF THE UNEMPLOYED 80 (1965). A detailed inquiry into individual necessities in every case is not required, since need is based on class studies and "operates in terms of averages." *Id.*[30] But the *raison d'etre* of the system is to meet individual needs:

> It is sometimes said that unemployment insurance is not based on need. Stated thus, without qualification, the proposition contains a grave error. . . . If in 1935 we had not judged that there existed a need which individuals were incapable of meeting themselves, unemployment insurance would not have been established. *Id.* at 81.[31]

[30]Because of the greater needs of low-income workers, unemployment benefit formulae are weighted in their favor: "The higher paid worker receiv[es] a smaller portion of his wages in benefits . . . [because] he is not in so great need as the lower-paid worker and is more able to help himself." *See* Becker, *The Inadequacy of Benefits in Unemployment Insurance*, IN AID OF THE UNEMPLOYED 81 (1965). Moreover, "a judgment as to need underlies the provision of uniform duration, minimum benefits, and—in twelve states—dependency allowances." *Id.*

[31]*See* Java *supra*, 402 U.S. at 130.

In holding that unemployment benefits may not be terminated or suspended in Vermont without a prior hearing, a three-judge district court pointed out:

> The fact that unemployment benefits are paid without reference to need, that is to say, without reference to a means test, does not mean that a given claimant's need is qualitatively different from that of a welfare recipient. While such need may from time to time not be, in *Goldberg's* turn of phrase, "brutal," speaking quantitatively, it is nonetheless compelling in the constitutional sense; the payment of unemployment benefits to those entitled to them permits retention of the basic human dignity that past accomplishment alone merits, avoiding in Macauley's stark phrase, sinking, after many vicissitudes of fortune, into "abject and hopeless poverty" [citation omitted]. *Wheeler* v. *Vermont*, 335 F. Supp. 856, 861-62 (D. Vt. 1971).

Empirical data confirms the vital role of unemployment benefits. For the average unemployment compensation recipient, unemployment imposes severe financial hardships, even with the uninterrupted payment of benefits. The median liquid assets available to a typical worker's family[11] to meet an emergency which cuts off the flow of income is only $260.00. Katoma, et. al., SURVEY OF CONSUMER FINANCES,

[11]There are 39,303,000 families in the United States and 9,136,000 unrelated individuals. The average family has 3.54 members. U.S. Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES, Table 40 at 35 (1970).

Table 6-3 at 100 (1970). But unemployment is especially likely to fall upon workers without any liquid assets.[33] Fifty-three percent of all unemployed workers in Indiana who are found eligible for unemployment benefits file more than one claim per benefit year. INDIANA EMPLOYMENT SECURITY DIVISION, SOME SIGNIFICANT STATISTICS ABOUT UNEMPLOYMENT INSURANCE IN INDIANA, Table 8 at 7 (March 1972) (hereinafter "*Significant Statistics*"). Employees who experience more than one unemployment episode per year are usually unable to build up cash reserves for periods of sudden unemployment. Since an unemployed worker must usually wait at least three weeks before unemployment benefits initially commence (*see* Manual §13130; *Java*, *supra*, 402 U.S. at 126), by the time payments begin, all of his savings will ordinarily have been exhausted.

Once payments do begin, the amount of money a recipient receives constitutes only a fraction of his former salary.[34] In order to adjust to the acute curtailment of family income, basic necessities often have to be sacrificed. According to one survey, twenty-six percent of households receiving unemploy-

[33]Even when employed, the average unemployed compensation claimant is hardly able to keep above the poverty line. In California, for example, the median annual earnings of unemployment compensation claimants was $3,933. California Department of Human Resources Development, Claimants Who Filed Valid New Claims October 1966-September 1967, Report No. 416, No. 6 at 3 (April 1, 1970); in New York, more than 40% of unemployment compensation claimants earned less than $3000, and more than 70% earned less than $5000 in 1967. New York State Department of Labor, Unemployment Insurance Beneficiaries (March 1970).

[34]In 1971, unemployment benefits in Indiana constituted less than 28% of the average wages of workers covered by the unemployment compensation program. *Significant Statistics*, *supra*, Table 6 at 6.

ment benefits must resort to reductions in food expenditures, usually in the first week of unemployment. P. KLEIN, FINANCIAL ADJUSTMENTS TO UNEMPLOYMENT 35, 40 (1965). Many recipients are forced to default on fixed obligations.[35] In over one-quarter of the households receiving unemployment compensation, the family is forced to go into debt during the year of unemployment. *See* P. KLEIN, *supra*, at 3. The percentage would be expected to be even higher among the recipients presently before this Court who, although found eligible for benefits for a fixed duration, receive *no* funds for many months pending a due process hearing. For these unemployed workers, the loss of unemployment benefits may be devastating. A study based on over five million unemployment compensation recipients points out that "the combination of all other types of non-wage income contributed less to the aggregate income of the unemployed than did unemployment insurance." Stein, *Special Labor Force Report: Work History, Attitudes & Income of the Unemployed*, 86 MONTHLY LAB. REV. 1405, 1411 (1963).

For the unemployment compensation recipient whose benefits are summarily terminated, welfare or

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[35] *See* Note, *The Relationship of Unemployment to Mortgage Foreclosure*, 86 MONTHLY LAB. REV. 1421, 1422 (1963). Approximately 30% of all unemployment compensation claimants become delinquent in payments on new appliances, and 14% become delinquent in rent payments. *See* P. KLEIN, FINANCIAL ADJUSTMENTS TO UNEMPLOYMENT 31 (1965).

charity is either unavailable or poses a cruel[36] and inadequate substitute for unemployment benefits. There are four categorical public assistance programs created by the Social Security Act and administered by the states: Blind Assistance, IND. ANN. STAT. §§52-1221 — 52-1239b (Burns 1964 Repl., 1971 Supp.); Disability Assistance, IND. ANN. STAT. §§52-1251a—52-1251v (Burns 1964 Repl., 1971 Supp.); Old Age Assistance, IND. ANN. STAT. §§52-1201 — 52-1220 (Burns 1964 Repl., 1971 Supp.); and Aid to Families with Dependent Children, IND. ANN. STAT. §§52-1240—52-1251 (Burns 1964 Repl., 1971 Supp.). Since an unemployment compensation recipient would have to be blind, disabled, or of retirement age to qualify for the first three categories, these would generally not be available to him, as he, by definition, must be eligible for the labor market. IND. ANN. STAT. §§52-1538a—52-1538b (Burns 1964 Repl., 1971 Supp.). In order to qualify for the fourth category (AFDC), the recipient must be the head of a family with only one able-bodied parent, a requirement which excludes all unmarried workers without children and the overwhelming proportion of married workers.[37]

[36] As Congress recognized in instituting a national unemployment compensation program, the worker who looks upon receiving welfare as a source of embarassment may lose his dignity and self-respect by being forced to apply for welfare assistance. *See* P. DOUGLAS, STANDARDS OF UNEMPLOYMENT INSURANCE 20 (1933). One of the chief purposes of the unemployment compensation program was to provide income for an unemployed worker *"without the necessity of his turning to welfare or private charity."* Java, *supra*, 402 U.S. at 131 (emphasis added).

[37] Unlike many other states, Indiana does not provide AFDC assistance for children of an unemployed father. The AFDC program for dependent children of unemployed fathers (AFDC-U) was established by §407 of the Social Security Act (42 U.S.C. §607), with participation by the states made optional. Indiana has chosen not to participate in the program.

Furthermore, to receive AFDC assistance a family must have less than $700 in resources. Indiana Public Assistance Manual, Chapter IV-B-10.

Nor are local emergency relief programs a feasible alternative in Indiana. Unlike many states, Indiana does not have a county-operated general assistance program. Emergency relief is a wholly local program administered by township trustees without any state standards. *See generally* IND. ANN. STAT. §§52-139—52-199 (Burns 1964 Repl., 1971 Supp.). Over 1000 township programs exist in the State.[11] Since emergency relief is funded by local resources,[12] it is completely inadequate to provide even a bare subsistence level of benefits.

Thus, an unemployed wage earner in Indiana whose benefits have been summarily terminated is virtually excluded from the four categorical public assistance programs and would suffer financial ruin if forced to rely on local emergency relief. *Compare Torres* v. *New York State Dept. of Labor, supra.* And, even if eligible for AFDC, he would first be required to undergo an eligibility investigation by the local welfare agency which may not be completed for a number of weeks.[13]

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[11]For a listing of the townships, *see* IND. ANN. STAT. §§65-211, 65-220 (Burns 1961 Repl.).

[12]*See* Horowitz and Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State*, 15 U.C.L.A. L. REV. 787, 813 (1968).

[13]In Indiana the determination of AFDC eligibility need not be completed for 30 days. Indiana Public Assistance Manual, Chaper VII-A-1.

The wrongful termination of unemployment benefits for many months may, therefore, cause economic catastrophe. As the court below noted in granting Mrs. Burney a temporary restraining order: "the continued withholding and termination of unemployment compensation benefits will deprive [her] of the source of income necessary to meet her food, clothing and shelter needs." In this case, as in *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 264:

> The termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits.[41]

The unemployment compensation recipient whose benefits are summarily terminated is in far more desperate straits than the wage earner whose paycheck was garnished in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). Under the Wisconsin pre-judgment garnishment statute declared unconstitutional in *Sniadach*, a worker still received from his paycheck a statutory "subsistence allowance" of $25.00 to $40.00 per pay period. 395 U.S. at 338 n.1. For the unemployment compensation recipient, the entire "subsistence allowance" is terminated, and nothing whatever is paid pending the hearing in his

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[41] As this Court found in *Java*, *supra*, 402 U.S. at 131-32:
Unemployment benefits provide cash to a newly unemployed worker "at a time when otherwise he would have nothing to spend," serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity. *See also* concurring opinion of Mr. Justice Douglas, 402 U.S. at 136.

case. Even more than pre-judgment garnishment, summary termination of unemployment benefits "may as a practical matter drive a wage-earning family to the wall." *Cf. Sniadach, supra,* 395 U.S. at 341-42.

As in *Goldberg* and *Sniadach*, then, the "crucial factor" of need pervades this case. Having been found initially eligible for unemployment compensation, the unemployment compensation recipient has by definition involuntarily lost his last job. Weeks may pass before he is able to find new work, especially in a period of widespread unemployment.[42] In light of the severe deprivation likely to be caused by a termination of benefits, a Referee hearing occurring many weeks or even months later is hardly likely to make the recipient whole. *See Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239 (1967).

C. The Complex Factual Nature of Unemployment Compensation Terminations Makes A Prior Hearing Particularly Necessary to Prevent the Termination of Benefits from Eligible Recipients.

A pre-termination due process hearing is essential "where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." *Goldberg* v. *Kelly, supra,* 397 U.S. at 268. A sampling of the issues most frequently arising in unemployment compensation

[42]The Indiana seasonally adjusted unemployment rate averaged 5.6% in 1971. *See Annual Report, supra* at 19.

termination cases reveals that they usually involve interaction with third parties, and that they are, in the words of the court in *Crow* v. *California Department of Human Resources Development*, 325 F. Supp. 1314, 1316 (N.D. Cal. 1970), "pre-eminently factual": Did the recipient work for pay while drawing benefits? Was the recipient able to work? Was the recipient available for work? Did the recipient make an effort to secure work? Did the recipient register for work? Did the recipient receive and refuse an offer of work? If so, was the work "suitable"? *See* IND. ANN. STAT. §§52-1538a, 52-1538b, 52-1539a (Burns 1964 Repl., 1971 Supp.); §52-1540 (Burns 1964 Repl.).

The answer to each of the above questions frequently involves a subjective judgment of the character and honesty of recipients, the evaluation and interpretation of third party information, and the application of complex and evaluative legal standards to a matrix of disputable facts. In Mrs. Burney's case, for example, the issues of whether she "refused an offer of suitable work" under IND. ANN. STAT. §52-1539a (Burns 1964 Repl., 1971 Supp.), or was "unavailable for work" under IND. ANN. STAT. §52-1538b (Burns 1964 Repl., 1971 Supp.) required a determination of the availability of child care and public transportation after midnight, the safety of public transportation at that hour, Mrs. Burney's physical condition, her prospects of obtaining work

at other hours and her independent efforts to do so, and the relationship between her previous employment and the prospective job offer."[13] All of these issues are largely factual in nature; many can only be determined by reference to third party information.

Under such circumstances, an evidentiary hearing is essential if disputes concerning continued eligibility are to be accurately resolved. Otherwise the decision whether an unemployed worker may continue to receive unemployment benefits—a decision which may be of monumental importance to him and his family—is left to an often harried clerk who each week must process hundreds of recipients.

Under the Division's termination procedures at issue herein, recipients are afforded no advance notice of the basis for the termination and no opportunity to confront and cross-examine any of the outside sources whose information is vital to the resolution

[13]Under Indiana case law such questions as "availablity" must be determined in light of all the facts and circumstances surrounding a case. *See, e.g.*, Walton v. Wilhelm, 120 Ind. App. 218, 91 N.E. 2d 373 (1950); Gardner v. Review Board of Indiana Employment Security Division, 267 N.E. 2d 844 (Ind. App. Ct. 1971). Questions of child care, transportation and past conditions of employment are all factors to be considered in determining what is "suitable work." *See, e.g.*, Hacker v. Review Board of Indiana Employment Security Division, 271 N.E. 2d 191 (Ind. App. Ct. 1971); Renwanz v. Review Board of Indiana Employment Security Division, 267 N.E. 2d 844 (Ind. App. Ct. 1971). IND. ANN. STAT. §52-1539a(a) (Burns 1964 Repl., 1971 Supp.) provides the following standards for determining whether Mrs. Burney should have accepted the post-midnight job at the Melting Pot Restaurant:

> In determining whether or not any such work is suitable for an individual, the Division shall consider the degree of risk involved to such individual's health, safety, and morals, his physical fitness and prior training and experience, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

of the case. Instead, the accuracy of the termination process depends solely on the clerk's inclination, ability and time to seek out and judge relevant information, and on the ability of recipients who are frequently of limited education to marshal and articulate their case on the spur of the moment to an accusing Division official.

The Division's summary termination procedure has proved extremely inaccurate. During 1971, over *48 per cent* of all appealed Division decisions to terminate benefits were reversed at Referee hearings. *Significant Statistics, supra,* at 10. This figure far exceeds the reversal rate of 36 per cent in welfare fair hearings, which the district court in *Goldberg* described as a "startling statistic". *See Kelly* v. *Wyman,* 294 F. Supp. 893, 901 (S.D.N.Y. 1968)." *See also Crow* v. *California Department of Human Resources Development,* 325 F. Supp. 1314, 1318 (N.D. Cal. 1970). The unreliability of Indiana's summary procedure is resounding proof that, rather than being "niceties" (J.S. at 10), the procedures required by due process are essential to protect unemployed workers against arbitrary government action. Indeed, in cases of appealed terminations, the Division would

"As the Fifth Circuit stated in another context: "We do not abdicate our judicial role to statistics. But when figures speak, we must listen." Hall v. St. Helena Parish School Board, 417 F. 2d 801, 809 (5th Cir. 1969).

have achieved a similar degree of accurary merely by flipping a coin."[15]

D. The State's Interest in the Administration of the Unemployment Compensation Program Does Not Justify Summarily Terminating the Payment of Benefits Pending a Due Process Hearing.

Casés upholding summary procedures under the due process clause have been described as "emergency situations," *Bell* v. *Burson*, 402 U.S. 535, 542 (1971), or instances "where harm to the public is threatened." *R. A. Holman & Co.* v. *S.E.C.*, 299 F. 2d 127, 131 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962)."[16] A review of the cases in which "emergency situations" justifying summary procedures were found to exist reveals that they bear no resemblance to the Division's interests allegedly existing in this case: *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908) (seizure of food not fit for human consumption); *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (seizure of mislabeled vitamin product); *Fahey* v. *Mallonee*, 332 U.S. 245 (1947) (conservatorship of insolvent savings and loan association); *Yakus* v. *United States*, 321 U.S. 414 (1944) (adoption of wartime price regulations); *Cafeteria*

[15] Compounding the problem, after summarily terminating recipients, the Division does not even afford them a prompt post-termination due process hearing. A recent survey indicates only 0.8% of all claimant appeals are decided within 30 days; only 3.9% are decided within 45 days; and only 17.7% are decided within 75 days. U.S. Dept. of Labor, Unemployment Insurance Statistics, Table 17a at 10 (Dec. 1971).

[16] In his concurring opinion in Sniadach v. Family Finance Corp., 395 U.S. 337, 343 (1969), Mr. Justice Harlan used the phrase "essential to protect a vital governmental interest."

& Restaurant Workers Union v. *McElroy*, 367 U.S. 886 (1961) (access to military installation).

The primary governmental interest advanced by the Division as justification for summarily terminating unemployment benefits is the desire to minimize administrative inconvenience. (J.S. at 10). In *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 261, similar considerations were also urged to justify terminating benefits prior to a due process hearing. Despite the fact that substantial expenditures were involved, 397 U.S. at 266, this Court held that the factors of expense and administrative convenience did not justify denying a pre-termination hearing meeting the ordinary standards of due process. 397 U.S. at 261. As this Court stated:

> The interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. 397 U.S. at 266.

Goldberg holds that the desire to minimize the expenditure of government funds does not, in any event, justify summarily terminating the payment of benefits. But it should be noted that the amount of expenditures necessitated by pre-termination hearings in the unemployment compensation system are mini-

mal in comparison to the amount of expenditures necessitated by pre-termination hearings in welfare. In welfare, any benefits wrongfully paid to recipients pending a due process hearing are likely to be unrecoverable, since welfare recipients "are likely to be judgment-proof." *Goldberg, supra,* 397 U.S. at 266. Unemployment compensation recipients, on the other hand, are by definition employable, IND. ANN. STAT. §52-1538b (Burns 1964 Repl., 1971 Supp.) and thus are likely to return to work in the future and accumulate sufficient funds to satisfy any debts owed to the Division because of an overpayment. The Division has ample means of recouping any overpayments that occur. If an overpayment is not voluntarily repaid, the Division can both offset the amount owed against any future benefits to which the recipient may become entitled (IND. ANN. STAT. §52-1537 (Burns 1964 Repl., 1971 Supp.))[11] and institute civil proceedings to recover the overpayment (IND. ANN. STAT. §52-1537(e) (Burns 1964 Repl., 1971 Supp.)). Criminal sanctions may also be imposed if a recipient makes a false statement or fails to disclose material facts. IND. ANN. STAT. §52-1559 (Burns 1964 Repl., 1971 Supp.). The striking ability of the Division to recover overpayments is revealed by its own statistics, which show that in 1971, approximately 72% of all overpayments made to ineligible recipients were recouped. *Annual Report, supra,*

[11] Offsetting overpayments against future benefits is a highly effective device since approximately 53% of all eligible claimants file more than one claim in the same benefit year. *See Significant Statistics, supra,* at 7.

at 34. *See also Crow* v. *California Department of Human Resources Development*, 325 F. Supp. 1314, 1317 (N.D. Cal. 1970).[48]

The Division has available additional means of reducing overpayments that do not entail terminating "sustaining funds"[49] of eligible recipients. As this Court pointed out in *Goldberg, supra*, 397 US. at 266:

> Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities.

See Wheeler v. *Vermont*, 335 F. Supp. 856 (D. Vt. 1971) (three-judge court). By increasing the number of Referees, the Division could markedly reduce the current unreasonably long period[50] between the filing of an appeal and the issuance of a Referee's decision. Since the Division's administrative costs are reimbursed by the federal government[51] and may not be drawn from the Employment Security Fund, 42 U.S.C. §§503(a), 1103(c)(1), the hiring of additional Referees would have no effect on the amount of money available for the payment of benefits.

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[48]The relative cost of providing due process for unemployment compensation recipients must be assessed in light of the fact that on January 1, 1972, the Indiana Employment Security Fund contained a surplus of $310,220,000.00 despite a prolonged high level of unemployment. *Annual Report, supra*, at 27.

[49]*See* Nash v. Florida Industrial Commission, 389 U.S. 235, 239 (1967).

[50]*See* pp. 18-19, *supra*.

[51]*See Annual Report* at 1, 7.

In arguing that the requirement of prior due process hearings runs counter to the State's interest in minimizing administrative inconvenience, the Division ignores the many important governmental interests that are *advanced* by the payment of benefits pending a due process hearing. *See* pp. 10-17, *supra*. This Court's statement in *Goldberg*, *supra*, 397 U.S. at 265, in reference to welfare, applies equally well to unemployment compensation:

> The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

Finally, as again pointed out in *Goldberg*, the summary termination of benefits fosters the inaccurate resolution of disputed cases and thus is contrary to both the governmental and recipient interest in providing unemployment benefits to all eligible recipients:

> [A recipient's] need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from . . . bureaucracy. 397 U.S. at 264.

Without unemployment benefits, an *eligible* recipient may be seriously hampered in appealing his termination. Funds are necessary to enable the recipient to contact witnesses, gather evidence, and possibly

retain counsel to represent him at the hearing. Faced with the need to provide the necessities of life for himself and his family, the terminated recipient can scarcely devote the time and energy necessary to prosecute his appeal. *Cf.* Note, *Withdrawal of Public Assistance: The Right to a Prior Hearing*, 76 YALE L. J. 1234 (1967).[52]

III.

AN INFORMAL INTERVIEW DOES NOT SATISFY CONSTITUTIONAL REQUIREMENTS FOR A DUE PROCESS HEARING.

The Division urges that a pre-termination informal conference combined with a post-termination evidentiary hearing satisfies due process. However, in *Wheeler* v. *Montgomery*, 397 U.S. 280 (1970), the companion case to *Goldberg* v. *Kelly*, *supra*, this Court specifically rejected the view that if a recipient is afforded some of the elements of due process prior to the termination of benefits, his remaining due process rights can be satisfied in a subsequent hearing. In *Wheeler*, *supra*, 397 U.S. at 281-82, this Court held unconstitutional a pre-termination "informal" conference which was substantially identical to the procedure the Division urges should "be imposed in this case."[53] (J.S. at 9).

[52]Because of the severe financial pressure on recipients who have no source of income pending appeal, some eligible recipients may abandon appealed cases to accept substandard, menial employment. This would be contrary to the governmental and recipient interest in an employee's obtaining "substantially equivalent employment." Java, *supra*, 402 U.S. at 132.

[53]It should be mentioned that the welfare conferences in Wheeler v. Montgomery, 397 U.S. 280, 281 (1970), were preceded by three days advance notice of the proposed discontinuance.

In *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 267-71, this Court described in detail the "minimum" procedural safeguards demanded by "rudimentary due process": (1) "timely and adequate notice detailing the reasons for a proposed termination," 397 U.S. at 267-68; (2) "an effective opportunity to defend by confronting any adverse witnesses," 397 U.S. at 268;" (3) "the right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel," 397 U.S. at 270; (4) "the decision-maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing," 397 U.S. at 271; and (5) "of course, an impartial decision-maker is essential." *Id.*

In setting forth the "minimum" requirements for a due process hearing, the Court stated in *Goldberg*

"The Division refers to procedural safeguards such as confrontation and cross-examination as "niceties" (J.S. at 10). Yet in Goldberg, *supra*, 397 U.S. at 269, this Court pointed out that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witness." The Court emphasized that confrontation and cross-examination were "minimum" elements of a due process hearing by quoting from Greene v. McElroy, 360 U.S. 474, 496 (1959) concerning the importance of the requirement:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.

Mrs. Burney does not contend that heresay evidence is inadmissible in unemployment compensation termination proceedings or that the right to confrontation and cross-examination may never be waived. The *opportunity* for confrontation and cross-examination, however, is constitutionally mandatory. Goldberg v. Kelly, *supra*, 397 U.S. at 270.

that "the pre-termination hearing need not take the from of a judicial or quasi-judicial trial." 397 U.S. at 266. Mrs. Burney does *not* contend that she and her class are entitled to a "formal trial" (J.S. at 9). She does maintain, however, that unemployment compensation recipients are entitled to an administrative termination procedure which conforms to the flexible, "rudimentary" standards set forth in *Goldberg, supra.*

Notwithstanding the fact that *Goldberg* specifically holds that such elements as confrontation and cross-examination are "minimum" ingredients of a due process pre-termination hearing, the Division urges that a procedure for determining *initial* eligibility such as that utilized by California in *Java, supra,* 402 U.S. at 125-128, may properly be used for *terminating* the payment of unemployment benefits (J.S. at 9). In so doing, the Division ignores the critical distinction between procedures that can be used when eligibility for governmental benefits is *initially* being determined, and the procedures that constitutionally must be followed to divest an individual of a statutory entitlement that he previously has been enjoying. For example, a state may properly employ an *ex parte* procedure to determine whether an individual will be awarded a driver's license or placed on welfare. However, once a driver's license is issued or initial welfare eligibility is established, state action seeking to revoke the driver's license or terminate continued welfare eligibility must

conform to due process prior hearing requirements. *Bell* v. *Burson*, 402 U.S. 535 (1971); *Goldberg* v. *Kelly*, *supra*.

Nothing in this Court's opinion in *Java*, *supra*, supports the use of an *ex parte* process to terminate unemployment benefits. On the contrary, while *Java* did not reach the due process issue,[55] this Court's opinion fully supports the view that due process requires a full evidentiary hearing prior to the termination of unemployment benefits. In deciding the case on statutory grounds, the Court reviewed the issue of need in connection with the purposes of unemployment compensation, pointed out the "obvious" "importance of this case to workers,"[56] and stated:

> A kind of need is present in the statutory scheme for [unemployment] insurance . . . since unemployment benefits provide cash to a newly unemployed worker "at a time when otherwise he would have nothing to spend" serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity. *Java*, *supra*, 402 U.S. at 130-32.[57]

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[55] *But see* Java, *supra*, 402 U.S. at 136 (Douglas, J.) (concurring opinion).

[56] 402 U.S. at 125.

[57] *See also* concurring opinion of Mr. Justice Douglas, Java, *supra*, 402 U.S. at 136. In holding that the termination of unemployment benefits prior to a full evidentiary hearing violated both due process and the Social Security Act, the three-judge district court in *Java* had stated:

> Defendants herein suggest that the unemployed person is perhaps not in such dire straits as the recipient of public assistance, in that he can always go on welfare, and thus save himself from absolute destitution. It is scant comfort to the disaster-stricken that there is someone, somewhere worse off than he, and this Court finds that the situation of the unemployed person herein is every bit as lamentable from the legal standpoint as that of the welfare client in Kelly v. Wyman and the garnishee in Sniadach v. Family Finance Corp. . . [citations omitted]. 317 F. Supp. 875, 878 (N.D. Cal. 1970).

Thus, *Java* not only fails to uphold the constitutionality of an informal conference as a means of terminating unemployment benefits, it strongly suggests that such terminations fall within the purview of *Goldberg* v. *Kelly, supra.*

CONCLUSION

In his concurring opinion in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), Mr. Justice Harlan pointed out that "notice and a prior hearing" are "the *usual* requisites of procedural due process." 395 U.S. at 342 (emphasis added). In *Goldberg, supra,* a prior due process hearing was recognized as essential to protect welfare recipients from the arbitrary termination of benetfis. While unemployment compensation and welfare bear striking resemblance to one another, Congress saw one basic distinction: Unlike welfare,[58] unemployment compensation was considered a worker's earned "contractual right"[59] to benefits which his labor helped to create.[60] In providing "subsistence" benefits to a worker "at a time when otherwise he would have nothing to

[58]Prior to *Goldberg*, welfare benefits were often considered to be a "gratuity." *See* Goldberg v. Kelly, *supra*, 397 U.S. at 261 n. 8; *cf. id.* at 271 (Black, J.) (dissenting opinion).

[59]Java, *supra*, 402 U.S. at 131-32; REPORT TO THE PRESIDENT OF THE COMMITTEE ON ECONOMIC SECURITY 13 (1935).

[60]"Even though the employers in the first instance pay the contribution . . . in the ultimate analysis it tends to rest upon the wage earner." Statement of Alvin H. Hansen, Chairman of Sub-Committee on Unemployment Insurance, Committee on Economic Security, *Hearings on S. 1130 Before the Sen. Comm. on Finance*, 74th Cong. 1st Sess. 447 (1935); *see* dialogue between Senator Black and Senator Wagner, *id.* at 25; dialogue between Senator Black and Frances Perkins, *id.* at 117-18; Note, *Charity versus Social Insurance In Unemployment Compensation Laws*, 73 YALE L. J. 357, 361 (1963).

spend,"[11] unemployment compensation serves the same purpose for the involuntarily unemployed as welfare serves for its beneficiaries. Surely due process and the Social Security Act provide unemployed workers with at least as much procedural protection as their counterparts in the public assistance programs.

The judgment below should be affirmed.

Dated: April 12, 1972.

Respectfully submitted,

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[11] Jones, *supra*, 402 U.S. at 131-32.

APR 28 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, JOHN F. COPPES, individually and as Director of the Indiana Employment Security Division; VAN SMITH, MAX WRIGHT, and ALBERT SUMMERS, individually and as members of the Indiana Employment Security Board, KENNETH M. SWAIN, individually and as Manager of the Fort Wayne Branch of the Indiana Employment Security Division,

Appellants,

v.

ESSIE D. BURNEY,

Appellee

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

APPELLANTS' REPLY TO APPELLEE'S MOTION TO AFFIRM

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The Motion to Affirm is quite long. Only certain basic uestions will be discussed here.

The Motion to Affirm incorrectly states the Indiana law to the determination procedures. As shown in the Jusdictional Statement (Jur. Stat.) at pp. 5-6, Indiana law rovides that when an unemployed person files an initial aim for benefits, a determination of his or her status as an nsured worker must be made. I.C. 1971, 22-4-17-2(a), as set ut at p. B-1 of Jur. Stat. That determination of insured tatus does not and cannot establish eligibility for any fu-

ture weeks. Rather, eligibility is determined weekly by a claims deputy on the basis of facts available for that week. I.C. 1971, 22-4-17-2(d), as set out at Jur. Stat., p. B-2. Thus, there is no "termination" or "suspension" of benefits and no reversal of a previously made administrative determination.

When Mrs. Burney was determined by the claims deputy to be ineligible for benefits for a certain week and until she held herself fully available for work, the issue of her eligibility for that period of time was first heard. No decision could have been made prior to that time because the prerequisites of eligibility included her behavior during that time—i.e. whether, during that week, she was physically and mentally able to work, available for work, and was making a good-faith effort to secure work. I.C. 1971, 22-4-14-3, set out in relevant part at Jur. Stat., p. 6.

This identical issue arose in the case of *Torres v. New York State Department of Labor*, 333 F.Supp. 341 (D.C.S.D. N.Y. 1971), affd. — U.S. —, 40 Law Week 3415, and it was there held that a determination as to a week of unemployment subsequent to the original determination was proper without an extended evidentiary hearing. A mere interview proceeding, similar to that described in *California Department of Human Resources v. Java*, 402 U.S. 121 (1971), was held suitable in that case, and that holding was affirmed by this Court, even though the facts of that case were significantly more favorable to the claimants therein than is true of this case. The New York law, as described in an earlier decision in the *Torres* case, 321 F.Supp. 432 (1971), did not speak of weekly determination of eligibility, contrary to the Indiana law. In addition, in *Torres*, one issue in dispute was the cause for separation. Thus there was, in that case, a redetermination of an issue previously decided. In this case, the only issue was Mrs. Burney's activities during a period after the determination of insured status.

It is true that not all claimants are intensively interviewed each week as to whether they actually meet all eligibility requirements. They are required to register each week, though, and the registration process includes a signed statement by the claimant as to the eligibility requirements. Indiana Employment Security Division, Unemployment Division, *Unemployment Compensation Claims Manual*, § 13620. This section provides that it will be unnecessary to question the claimant in detail each week, but that answers will be ascertained to certain basic questions of eligibility. The section is set out in full in the appendix hereto.

It was pointed out at Jur. Stat., p. 10, that because of the volume of claims involved, some summary method of determination must be used for most of the cases in which there is less likelihood of doubt as to eligibility. The fact that some eligibility determinations are made summarily on the basis of a signed statement by the claimant does not negate the law of Indiana or the fact that there actually is a weekly determination of eligibility.

No reply is thought necessary to the long argument that, on the whole, unemployment compensation is a good thing. That view is shared by the Division. The issue is, rather, whether the Division is operating in compliance with the federal law and constitutional requirements.

It has been shown above and in the Jurisdictional Statement that the Indiana procedure is in compliance with the "payment when due" requirements of federal law, since the only determination ever made for the weeks in question was that payment was *not* due. It is also necessary to consider the constitutional arguments advanced in the Motion to Affirm.

It is assumed in the Motion to Affirm that this Court, in *Goldberg v. Kelly*, 397 U.S. 254 (1970), set out hearing requirements which are equally applicable to all administrative proceedings affecting any benefits whatever. The *Gold-*

berg procedures do not have this far reaching applicability. This proposition can best be demonstrated by reference to this Court's opinion in *Daniel, Director, Cook County Department of Public Aid v. Goliday,* 398 U.S. 73 (1970), wherein this Court refused to automatically extend *Goldberg,* which dealt with termination or suspension of public welfare benefits, to cases involving only reduction of those same benefits. Rather, *Goliday* was remanded for further proceedings to develop a record aimed toward that specific issue.

As pointed out in the Jurisdictional Statement, pp. 8-9, the due process concept does not set up a single, unchanging standard of procedure, but requires a separate determination as to each type of situation in which the due process requirement is invoked. A procedure far short of the *Goldberg* requirements was cited with apparent approval by this Court as to initial unemployment compensation eligibility determinations in *Java,* supra. The *Torres* case, supra, also held that procedures such as that urged by the Division complied with the constitutional requirements, and that decision, to repeat what was stated earlier, was affirmed by this Court.

It is thus clear that the decision of the lower court in this case is not so obviously correct as not to require further argument. Rather, it is clearly incorrect. The issues presented in the Jurisdictional Statement are substantial.

It might be further noted that the same issue is involved in the case of *Crow v. California Department of Human Resources Development,* Nos. 71-1045 and 26740 in the United States Court of Appeals for the Ninth Circuit. Counsel for the claimant in that case are also on the Motion to Affirm in this case. Appellants here are informed by counsel for the California agency that they intend to petition to transfer that case directly to this Court so that it might be considered jointly with this case.

CONCLUSION

Appellants respectfully request this Court to deny Appellee's Motion to Affirm and to set the case for plenary consideration, or, in the alternative, summarily reverse the decision of the District Court on the basis of *Torres*, supra.

Respectfully submitted,

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APPENDIX

Indiana Employment Security Division, Unemployment Division, *Unemployment Compensation Claims Manual*, § 13620.

13620 Accepting the Voucher

The claims taker will accept continued claims for benefits, by questioning the claimant, executing the Benefit Voucher, Form 510, and making all entries on the appropriate lines in the benefit period record of Form 506.

All Forms 510 will be prepared as explained on the Instruction Sheets for the preparation of the form and in accordance with the Manual sections pertaining to accepting the voucher. (If the claimant is entitled to benefits from an employer under a SUB Plan, see the Instruction Sheet for preparation of Form 595, Benefit Entitlement Certification.)

The benefit rights interview will have thoroughly acquainted the claimant with the import and content of the statement which he will be required to sign as part of his certification with respect to each week for which he is making a claim. The statement contains all of the elements pertinent to questions of availability and capability. Therefore, it is unnecessary to question the claimant in detail to the same effect with respect to each certification. Consequently, the normal continued claim function will be reduced to:

a. Ascertaining answers to the following questions:
   (1) Did you work anywhere last week? If so, what were your earnings?
   (2) Did you refuse an offer of work?

b. Exploring any obvious question of the claimant's ability to work.

At any time in the accepting of a claim that a potential issue of eligibility or disqualification arises, the claims taker will refer the claimant to a deputy for

the necessary fact finding. In this case a Form 527 and the Form 510 will be transmitted with the claim record card to the deputy.

c. Checking his occupation classification against shortage lists.

Care should also be exercised to assure that the claimant's address has not changed. If the claimant has moved since last reporting, Form 512, Change or Transfer Request will be prepared showing the claimant's new address and will be transmitted to the Benefit Payments Section in the same transmittal with the voucher.

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IN THE

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OCTOBER TERM, 1971

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Appellants,

-VS-

ESSIE B. BURNEY,

Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

OPINIONS BELOW

The opinion of the United States District Court and its order denying appellant's Motion to Amend the judgment have not been reported. They are set out in the Jurisdictional Statement at pages A-1 through A-12.

JURISDICTION

The basis of the jurisdiction of this Court over this appeal is 28 U.S.C. § 1253, providing for appeal directly to this Court in cases required to be heard and determined by a district court of three judges.

The District Court entered its Memorandum of Decision on October 27, 1971. (App. 3-4). Appellants (hereafter referred to as the Division) filed a motion to amend the Decree and Injunction, pursuant to Federal Rules of Civil Procedure, Rules 59(e), 60(b)(6), and 65(d), on November 8, 1971. (App. 4, 34-43). This Motion was denied by the District Court on November 29, 1971. (App. 48). Notice of Appeal was filed on January 3, 1972. (App. 5). This appeal was docketed on March 2, 1972, and probable jurisdiction noted on May 30, 1972.

STATUTORY PROVISIONS

The statutes involved in this appeal are 42 U.S.C. § 503 and Indiana Code of 1971, 22-4-17-2. Because of their length, these provisions are set out in Appendix A hereto.

QUESTIONS PRESENTED FOR REVIEW

1. Whether an unemployed person receiving benefits under the Indiana Employment Security Act, after having been determined to be an insured worker and having been found eligible for benefits for certain weeks, may be determined to be ineligible for benefits for later weeks by reason of failure to meet eligibility standards during periods after the initial determination, without a "prior due process hearing."

2. If it be determined that such a hearing is required, whether the type of hearing required is a full, adversary, evidentiary hearing or an informal hearing process by which all interested parties are informed of the issues and the alleged facts upon which a determination of ineligibility would be made and are allowed to present such infor-

mation and explanation as they see fit, but without the formal requisites of a trial-type hearing.

STATEMENT OF THE CASE

On or about January 7, 1971, Appellee Essie B. Burney was determined to be eligible for unemployment compensation benefits as a result of the termination of her previous employment. She received benefits of forty dollars per week until March 26, 1971, at which time her benefits were suspended. During a regularly scheduled interview on March 24, 1971, she informed the Division's claims deputy that she was available only for first shift work. For that reason she was ruled not to have been available for work for the week ending March 27, 1971, and for future weeks until such time as she should enter the labor market and become available for all shifts of work. (App. 30-32).

On April 27, 1971, Mrs. Burney filed a Motion to Intervene as Plaintiff and Complaint of Intervening Plaintiff in an action previously filed as a class action against the Division. (App. 15-23). That action, heard by a three-judge court, had sought to declare invalid the Indiana statutory provision that a recipient found to be eligible by the Division would have his benefits suspended upon an appeal by the employer of that determination. (App. 7-14). That original issue was decided on the authority of this Court's decision in *California Department of Human Resources Development v. Java,* 402 U.S. 121 (1971), issued while this action was pending in the District Court, and is not an issue on this appeal.

On May 7, 1971, the District Court granted Mrs. Burney a temporary restraining order requiring the division to reinstate her benefit rights and not again suspend or terminate them "without a prior, due process hearing." (App. 2).

Mrs. Burney was granted a hearing before an appeals referee on July 1, 1971, and on July 13, 1971, the referee

affirmed the ruling that Mrs. Burney was ineligible. (App. 31).[1]

On September 21, 1971, Mrs. Burney moved for summary judgment (App. 27-28), which motion was granted and judgment entered on October 27, 1971. (App. 3-4, Jur. Stat. A-1—A-11).

The Division filed on November 8, 1971, a motion to amend the injunction to specify that the type of hearing required be the California determination procedure approved by this Court in *Java*.[2] (App. 34-43). A memorandum in opposition to the motion was filed, arguing that a formal, adversary, evidentiary hearing be required. (App. 44-47). On November 29, 1971, the District Court entered an order denying the Division's Motion. (App. 48). Notice of Appeal was filed on January 3, 1972. (App. 5).

SUMMARY OF ARGUMENT

Under Indiana law, a separate determination of eligibility must be made each week because the law requires that a claimant must exhibit a specific course of conduct during that week. Thus, it is incorrect to refer to a determination of ineligibility for a certain week as a "termination" or "suspension" of benefits.

The Indiana system fulfills the requirement of paying benefits "when due," since each week's claim is a separate one requiring an initial determination. A finding that a claimant is ineligible for that week is a determination that benefits are not due.

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[1] Mrs. Burney then appealed the referee decision to the Review Board of the Division, which on December 6, 1971, after the judgment of the District Court, reversed the referee decision.

[2] This Motion, timely filed under Federal Rules of Civil Procedure, Rule 59(e), suspended the time for appeal so that the Notice of Appeal, although filed more than sixty days after the filing of the Memorandum of Decision, was still timely to preserve the right to appeal therefrom. 6A *Moore's Federal Practice*, § 59.12(2) and cases there cited.

This court's decision in the *Java* case is not applicable to the facts of this case. The basic rule of that case is that an interested party—in that case, the employer—cannot require reversal of the deputy determination pending appeal. That rationale supports the position of the Division in this case.

This Court's decision in *Goldberg v. Kelly* is inapplicable because the welfare programs considered there operate on a theory different from that of unemployment compensation. Moreover, *Goldberg* involved termination of a vested, predetermined right, while this case involves an initial determination.

All these factors were considered in the case of *Torres v. New York Department of Labor,* in which a decision for the state agency was affirmed by this Court. This case is indistinguishable from *Torres.*

The injunction in this case requires a "prior, due process hearing." The phase is not defined. A request for clarification was denied. The injunction is so vague as to be unenforceable.

The Indiana procedure is basically similar to the California procedure discussed favorably by this Court in *Java,* with modification to deal with the circumstances of continued claims.

Claimant has urged a proceeding based on *Goldberg v. Kelly* which would require a full trial or at least deferral until the referee hearing.

Due process requirements vary to fit the particular circumstance. The concern of the division is to provide a reliable system that will be flexible and informal enough to deal with the number of claims involved. The present Indiana system meets those requirements.

ARGUMENT

I

An Administrative Determination of the Eligibility of A Claimant for Benefits is Permissible.

The District Court in this case declared invalid, as contrary to the Social Security Act, certain provisions of Indiana law which set out the procedures used by the Division to determine the eligibility of claimants for unemployment compensation benefits. The relevant portion of the District Court decree is as follows:

> "4. Further, the defendants, their successors in office, their agents and employees are enjoined from terminating, withholding, suspending and reducing the unemployment compensation benefits of plaintiff Burney and members of the class, who have been determined eligible and subsequently ineligible pursuant to an administrative decision, without a prior due process hearing."

The authority cited by the District Court was this Court's decision of *California Department of Human Resources Development*, 402 U.S. 121 (1971). These statutes and *Java* will be examined.

A.

THE INDIANA LAW

The basic Indiana statute controlling the determination of eligibility is Indiana Code of 1971, 22-4-17-2, as set out in Appendix A of this brief. Under the statute, a person who is unemployed makes an initial claim for benefits, at which time his status as an "insured worker" is determined. An "insured worker" is defined as one who has earned the required amount in wage credits. Indiana Code of 1971, (I.C. 1971) 22-4-2-25, as found in Ind. Ann. Stat. (Burns 1964 Repl.) § 52-1526x. At that time, the Division also makes a determination of eligibility for the first week of benefits.

Under the Indiana Statute, as is common among the unemployment compensation laws of the various states, eligibility is determined on a week-by-week basis. I.C. 1971, 22-4-17-2(d) provides as follows:

> "In addition to the foregoing determination of insured status by the Division, the deputy shall, throughout the benefit period determine the claimant's eligibility with respect to each week for which he claims waiting period credit or benefit rights, the validity of his claim therefor, and as the case may be the attributability to the employer of the cause for which the claimant left his work. . . ."

For purposes of analysis, weekly claims may be distinguished into initial claims, which are determinations of eligibility for the first week, and continued claims, which are determinations of eligibility for subsequent weeks.

This classification is based on a consideration of the requirements for eligibility which may similarly be divided into two groups. The first deals with the circumstances surrounding the termination of the prior employment, such as whether the claimant is out of a job because of a lack of available work, or because of misconduct, or because the claimant may have quit his job voluntarily not for good cause attributable to the employer. That determination is ordinarily made on the initial claim and not redetermined at that level.[3]

Either the Claimant or employer may appeal the deputy's decision to a referee for determination de novo.

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[3] Cf. *Torres v. New York State Department of Labor et al.*, 321 F.Supp. 432 (U.S.D.C., S.D.N.Y. 1971); remanded to the District Court, 402 U.S. 968 (1971). reinstated with further opinion, 333 F.Supp. 341 (1971); affirmed — U.S. —, 92 S.Ct. 1185 (1972). In that case the initial request for information to the employer was incorrectly addressed and never received. Under such circumstances, a redetermination of the termination issue was allowed and would indeed appear mandatory to provide due process to the employer, whose account was being charged.

The second group of issues deal with the claimant's activities during the period of unemployment and must be determined weekly. The greatest number of disputes in regard to these issues arise from the requirements of I.C. 1971, 22-4-14-3, as found in Ind. Ann. Stat. (Burns 1971 Supp.) § 52-1538b, which states in relevant part:

> "An unemployed individual shall be eligible to receive benefits with respect to any week only if he is physically and mentally able to work, is available for work and is found by the Division to be making an effort to secure work."

And, of course, there are also continuing requirements that the claimant still be unemployed and that he register for benefits. A determination of ineligibility for a certain week may, depending on the issue involved, affect only the claim for that specific week or may carry with it a penalty of suspension of benefits for future weeks.

Such weekly determination of eligibility is essential, because of the affirmative duties placed on a claimant. He must demonstrate certain conduct each week to be eligible for benefits for that week. It is a physical impossibility for the Division to determine in the first week whether a claimant will, for example, be available for work in the tenth or twentieth week. The Division does not have on hand a supply of reliable crystal balls, so that any effort to apply the determination of eligibility for one week to the situation of later weeks could only be described as arbitrary, unreasonable, capricious and a violation of due process.

Yet, this unreasonable system is precisely what the District Court is requiring the Division to follow. The District Court held that an initial determination of eligibility has a continuing effect to ascribe eligibility for later weeks as to all issues. It ruled that a claimant once determined eligible for any week remains eligible and the Division

would have to take action to revoke that pre-existing eligibility.

The exact language of the District Court opinion is as follows:

> "Even though defendants review on a weekly basis the eligibility of a claimant, the court finds that the concept of when benefits are 'due' under the Social Security Act does not change from week to week after a claimant has been found eligible and no prior, due process hearing has been held with regard to a subsequent finding of ineligibility. The court thus finds that plaintiff Burney's benefits were 'due' and could not be summarily suspended due to a deputy's determination of ineligibility under § 52-1542a(d) [I.C., 22-4-17-2]."

This can be readily seen to be an erroneous statement of the purpose and provisions of Indiana law. Whether or not the "concept" of a claimant's application (whatever that might be) changes from week to week, a claimant's conduct surely can change over the period of unemployment. Indiana law requires that the claimant be available for work and actively seeking work each week as a condition for eligibility for unemployment compensation benefits for that week. That determination can only be made after the fact. Thus, each week's claim presents a new case for determination, and each such determination is an *initial* determination.[4] Reliance on prior weeks' decisions would clearly be improper.

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[4] As stated above, the issue of cause of termination of the prior employment is ordinarily determined only once, but the continuing effect of this determination is merely because of res judicata. Res judicata applies only to issues which were or could have been determined in the first case. There is no way that a tribunal can make a decision as to the effect of conduct in the future which conduct cannot be predicted.

B.

THE SOCIAL SECURITY ACT

The unemployment compensation program is one of the joint federal-state programs under the Social Security Act. See 42 U.S.C. §§ 501-504. Unlike some of the other programs, however, the statute is general as to what the program shall include.[5]

The statutory limitations on the program are primarily that the state plan must "be reasonably calculated to insure full payment of unemployment compensation when due," and must provide an opportunity for a fair hearing for claimants who are denied compensation. 42 U.S.C. § 503. (This section is set out in Appendix A of this brief.) The power of the Secretary of Labor, under these general provisions, however, is extensive in setting requirements for the states to follow. Thus, there is a high degree of uniformity among the state plans. It might be noted that the Indiana law had received certification from the Secretary of Labor.

The issue in this case, as respects the federal law, is whether a system of weekly initial determinations of eligibility provides "payment when due" as required by § 503 (a)(1). The problem is to find the proper method of determining when benefits are due.

It is no doubt an oversimplification merely to say that benefits are "due" to those claimants who are eligible under the approved state law. This fundamental truism must be kept in mind, however, to maintain a proper perspective. The word "due" is not a magic talisman, as the District Court apparently considered it, but merely a shorthand reference to *all the issues* of eligibility.

The method of determining eligibility on a week-to-week basis is under attack here. Yet, as shown above, that is

[5] Compare, for example, 42 U.S.C. § 606, which gives quite specific delineation of the AFDC program.

the manner by which the various states, with the approval of the Secretary of Labor, have been making the determinations—week by week.

Therefore, under the law as it both is and should be, a determination of eligibility for one week has no effect on the decision of the issues of availability, effort to secure work, etc., for any future week. In Mrs. Burney's case, the determination of whether she was available for work during the week ending March 20, 1971, for which she received benefits, was totally separate from the determination of her availability for work the week ending March 27, 1971.

No determination was ever made that Mrs. Burney was eligible for benefits for the week ending March 27, 1971. A determination was made that benefits were *not* "due" her for that week. That was the only determination made for *that week* at the time the Division acted.

C.

THE JAVA DECISION

The decision of the District Court in this case cites as authority the opinion of this Court in *California Department of Human Resources Development v. Java,* 401 U.S. 121 (1971). A consideration of the fact situation in *Java* shows that case to be no authority for the District Court in this case. Rather, the rationale of that case supports the Division herein.

In *Java,* the claimant was found to be *eligible* for benefits by the California agency. Under the law then in effect, those benefits were required to be withheld upon the filing of an appeal by the employer. No benefits were allowed to be paid a claimant until the total appellate process was complete. This Court held that the determination of *eligibility* by the agency made payments "due". The improper portion of the state law was allowing an employer to force

the withholding of benefits which would otherwise be paid by the agency.

Java raised no issues and involved no factual situation involving a continued claim. Only the initial determination was under consideration there. This case, then, involves the converse of *Java* since the determination on the issue of availability for the week in question was that payments were not "due" because Mrs. Burney was not holding herself available for work.

Java, in essence, decided that the determination of the deputy was to be accepted by the agency as its basis for action rather than the position advocated by an interested party, the employer. In unemployment compensation cases, there are three parties, the claimant, the employer, and the Division. Two of these parties clearly have an interest in the outcome of the matter; only the Division is in a position where impartiality might be likely. *Java* decided that an employer may not be given the power to overrule the deputy determination pending appeal. The issue in this case is whether a claimant shall have a corresponding right to overrule the deputy pending appeal.

The Division, being made up of human beings, does not achieve perfection; no human agency ever does. Therefore, appeal rights are provided. But an impartial deputy decision is still more reasonable than a decision by a claimant who clearly has an interest in the outcome. The same rationale that prohibited placing such power in the employer also prohibits placing the power in the claimant.

D.

THE GOLDBERG DECISION

Another matter worthy of consideration is the effect of the decision of this Court in *Goldberg v. Kelly,* 397 U.S. 254 (1970), on this case. *Goldberg* was argued by the claimant

in this case as an alternate grounds of decision. This case will be further considered in part II of this argument, relating to the nature of a due process hearing. The purpose of this section is to distinguish the programs and procedures involved. *Goldberg* involved the programs of Aid to Families with Dependent Children (AFDC) and a purely state and local level general relief program.

The first and foremost difference is that *Goldberg* involves a termination of a vested pre-determined right, while this case presents a determination on what is, both in fact and in law, an initial determination. There is no authority known for the proposition that a potential welfare recipient must be given an evidentiary hearing before an initial application can be refused.

Unemployment compensation is not a general welfare program. Three obvious differences can be noted. First, welfare programs are based strictly on need. This is not true of unemployment compensation, although the fact that unemployed people might be in need presumably was considered by Congress when instituting the program. That need is not the criterion can be seen from two different approaches. First, since there is no needs test, an unemployed person may receive compensation even though he might have ample resources to sustain himself and his family. At the other end, a person who is clearly destitute might not receive unemployment compensation when he loses a job because, for example, he had not accumulated sufficient wage credits to qualify as an "insured worker", (see p. 6, supra.), or he was terminated under circumstances which might disqualify him. (See p. 7, supra.).

A second difference, particularly relevant to this case, is that affirmative duties are placed upon recipients of unemployment compensation benefits which are not placed on recipients under welfare programs. The reason this case arose is that a claimant for unemployment compensation

benefits must show that, each week, "he is physically and mentally able to work, is available for work, and is . . . making an effort to secure work." I.C. 1971, 22-4-14-3, supra. No similar affirmative duties are placed on recipients under welfare programs.

A third difference is that the programs are different in scope in that unemployment compensation is basically a short-term program to aid persons off work only for the period of time it takes them to find work. Welfare programs are designed to meet long-term needs. Old age, blindness, and disability, for example, are conditions which are ordinarily either permanent or of long duration. The AFDC program has more variables to take into account, but the process of bringing children to age cannot be speeded up. The requirement that a parent be unavailable because of death, incapacity, or "continued absence from the home," also appears to be a long-term problem not susceptible of speedy remedy. See 42 U.S.C. § 606.

These differences were recognized by Congress when it established the unemployment compensation program.

> "Unemployment compensation differs from relief in that payments are made as a matter of right, not on a needs basis, but only while the worker is involuntarily unemployed. In all compensation systems the period during which compensation is payable is limited in some relation to the previous period of employment. Invariably there is a waiting period immediately following unemployment during which no compensation is payable. Thereafter compensation is paid as a stated percentage of the previous wage, customarily with both a minimum and maximum rate. Payment of compensation is conditioned upon continued involuntary unemployment. Beneficiaries must accept suitable employment offered them or they lose their right to compensation. After a specified period of time the compensation is discontinued in any event." Report No. 628, United

States Senate Accompanying H.R. 7260, 74th Congress, 1st Session.

See also, Report of the Advisory Counsel to the Committee on Economic Security, dated December 18, 1934 and 79 Cong. Rec. 5468 (1935) (Remarks of Representative Doughton).

These differences in the programs emphasize that the *Goldberg* rule as to termination of vested eligibility rights is inapplicable to cases involving the initial determination of whether an unemployment compensation claimant had fulfilled his affirmative duties to be available for work, etc., during a given week.

E.

THE TORRES DECISION

All these factors are brought together in consideration of *Torres v. New York Department of Labor*, supra. This was a class action involving two named claimants. The facts of Mr. Torres' case are set out above at p. 7. The facts in the case of the other named plaintiff, Mr. Dinger, are very similar to those in this case. He had received benefits for a period of time and then was found, in a periodic interview, to have failed to make a sincere effort to secure work. 321 F.Supp. at 436.

The case was tried to a three-judge court both on statutory and due process issues. The New York statute, quite similar to the Indiana law, was upheld. 321 F.Supp. 432. On appeal to this Court, the cause was remanded for further consideration in light of the decision in *Java*, which came after the District Court decision. 402 U.S. 968 (1971). Upon reconsideration, the District Court in a per curiam decision declared *Java* inapplicable to the facts of the case and again gave approval to the New York statute. 333 F.Supp. 341 (1971). That decision was affirmed by this Court. — U.S. —, 92 S. Ct. 1185 (1972).

Each of the issues in this case, plus matters not decided by the District Court in this case, were fully considered in *Torres* and a similar state law upheld. It is suggested that this case cannot be distinguished from *Torres* and should be similarly decided.

II

Even Were a Hearing Required, No Formal Evidentiary, Adversary Hearing Would be Called For

It will first be noted that 42 U.S.C. § 503(a)(3) requires that a hearing be provided. This has been interpreted, though, to mean a full, evidentiary hearing after the fact. After the determination of the Deputy (which is itself a hearing), either party has the right to demand a referee hearing. I.C. 1971, 22-4-17-2, supra. (See Appendix A to this Brief). Further appeal is then provided.

If it should be determined that a hearing is required before a determination of ineligibility on a continued claim may be made, there is still an issue as to the type of hearing required. The opinion of the District Court required only a "prior, due process hearing". The Division filed a timely Motion requesting the injunction be made more specific. (App. 34-43). This Motion was supported by an extensive memorandum. Claimant filed a Memorandum Opposing Defendant's Motion (App. 44-47). The Division's Motion was denied. (App. 48).

It is submitted that the injunction as it now stands is so vague as to be unenforceable. *Gunn v. University Committee,* 399 U.S. 383 (1970). The language used by the District Court was the requirement of a "prior, due process hearing." Due process, though, does not set up a single, unchanging standard of procedure, but requires a separate determination as to each type of situation in which the due process requirement is invoked. *Goldberg v. Kelly,* supra; *FCC v. WJR,* 337 U.S. 265 (1949). As stated in the *WJR* case:

> "The Fifth Amendment guarantees no particular form of procedure; it protects substantive rights. • • • The requirements imposed by that guarantee are not technical, nor is any particular form of procedure necessary." 337 U.S. at 275.

A comparison of the procedures suggested in the memoranda supporting and opposing the Motion to amend clearly point up the differences to be considered here.

A.

THE JAVA-TYPE PROCEEDING

This Court in *Java*, supra, dealt at some length with the hearing procedure used in California to determine initial claims. This Court noted that:

> "Although the eligibility interview is informal and does not contemplate taking evidence in the traditional judicial sense, it has adversary characteristics. . . ." 402 U.S. at 135.

In considering this issue, a fuller statement of the Indiana procedure might be useful in applying the *Java* procedure to a continued claim situation.

Each new claimant is given a Benefit Rights Interview. Indiana Employment Security Division, *Unemployment Compensation Claims Manual* (referred to herein as Manual), § 13710. A full explanation of his duties under the law is given in Manual, § 13712. Claimants are then classified as to their attachment to the labor market. Manual §§ 13720, 13723. They are given periodic interviews at set intervals. Manual, § 13725. The periodic interview deals in some depth with the claimant's eligibility. Manual, §§ 13731, 13732. During weeks when a claimant is not given a periodic interview, he will make a written certification as to the conditions of his eligibility and is given a summary interview by a claims taker. Manual § 13620.

It must be noted that in this case, as is quite common, the disqualifying information came from the claimant. Mrs. Burney stated, during such an interview, the information which led to the finding of ineligibility. (App. 32)[6] In other cases, information might come from the report on a job referral from the division or from any other source.

If the facts are evident and no employer is involved, a determination will be made immediately. Where there is a dispute, information and rebuttal is usually obtained by telephone. This is specifically required on separation issues. Manual § 17100. This Indiana procedure and the California procedure described in *Java* are basically similar.

B.

THE GOLDBERG-TYPE PROCEEDING

The decision in *Goldberg,* supra, set out certain requirements for the type of hearing required in that situation. 397 U.S. at 267-271. These were set out, and perhaps expanded, by Claimant in the Memorandum Opposing Defendant's Motion (App. 44-46). These procedures are somewhat more formal and exacting than a court trial.[7] Perhaps, however, a deferral to a referee hearing would be considered a good-faith effort to comply with such rules.

C.

THE DETERMINANTS OF DUE PROCESS

It has already been stated above that due process is a flexible standard which varies to fit the specific situation.

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[6] This determination was affirmed by a referee after a full evidentiary hearing. (App. 31). After the decision of this cause in the District Court, the Review Board reversed the referee decision. A decision of the Indiana Appellate Court, *Hacker v. Review Board,* 271 N.E.2d 191 (1971), not yet reported at the time of the referee decision, established that the circumstances of cases such as Mrs. Burney's were not grounds for a determination of ineligibility.

[7] For example, a court may take judicial notice; this would not be allowed under Claimant's proposal.

A weighing of the interests involved must be considered. *Goldberg,* supra, 397 U.S. at 262-263.

In terms of payment of monies, the Division has no interest one way or the other. The money to pay benefits comes from special taxes on employers. I.C. 1971, 22-4-10-1 et seq. There remains, then, the factor which is the interest of the Division. That is the factor of insuring that a system is instituted which will prove workable. A system that breaks down under its own weight will be to the best interest of none of the parties.

It has been emphasized throughout this brief that the determination involved is an *initial* determination of eligibility for that week as to issues such as that involved in Mrs. Burney's case. Such a determination must be made each week for every claim filed, and a hearing procedure must be used on each of those cases in which there is any suggestion of possible ineligibility. Thus, the procedure used must, while being full enough to reach a meaningful and rational decision, be summary enough that the whole system does not fall into complete chaos. A system such as that used in Indiana and most, if not all, other states meets these two criteria. *Java,* supra.

CONCLUSION

For the foregoing reasons, the decision of the District Court in this case should be reversed and remanded for entry of judgment for the Division. In the alternative, the cause should be remanded to the District Court for clarification of the procedures required under that Court's injunction.

Respectfully submitted,

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APPENDIX A

Indiana Code of 1971, 22-4-17-2

Sec. 2. (a) When an individual files an initial claim the Division shall promptly make a determination of his status as an insured worker, in a form prescribed by the board. A written notice of the determination of insured status shall be furnished him promptly. Each such determination shall be based on and include a written statement showing the amount of wages paid to him for insured work by each employer during his base period and shall include a finding as to whether such wages meet the requirements for him to be an insured worker, and, if so, the week ending date of the first week of his benefit period, his weekly benefit amount, and the maximum amount of benefits that may be paid to him for weeks of unemployment in his benefit period. For the individual who is not insured, the notice shall include the reason for the determination. Unless the individual, within ten (10) days after such determination was mailed to his last known address, or otherwise delivered to him, asks a hearing thereon before a referee, such determination shall be final and benefits shall be paid or denied in accordance therewith.

(b) The Division shall promptly furnish each employer in the base period whose experience or reimbursable account is potentially chargeable with benefits to be paid to such individual with a notice in writing of his benefit liability. Such notice shall contain the date, the name and social security account number of the individual, the ending date of his base period and the week ending date of the first week of his benefit period. Such notice shall further contain information as to the proportion of benefits chargeable to the employer's experience or reimbursable account in ratio to the earnings of such individual from such employer. Unless the employer within ten (10) days after such notice of benefit liability was mailed to his last known address, or otherwise delivered to him, asks a hearing

thereon before a referee, such determination shall be final and benefits paid shall be charged in accordance therewith.

(c) An employing unit, including an employer, having knowledge of any facts which may affect an individual's eligibility or right to waiting period credits or benefits, shall notify the Division of such facts promptly in accordance with regulations prescribed by the board.

(d) In addition to the foregoing determination of insured status by the Division, the deputy shall, throughout the benefit period determine the claimant's eligibility with respect to each week for which he claims waiting period credit or benefit rights, the validity of his claim therefor, and as the case may be the attributability to the employer of the cause for which the claimant left his work, or may refer such claim to a referee, who shall make the initial determination with respect thereto in accordance with the procedure in IC 1971, 22-4-17-3 hereof.

(e) In cases where the claimant's benefit eligibility or disqualification is disputed, the Division shall promptly notify the claimant and the employer or employers directly involved or connected with the issue raised as to the validity of such claim, the eligibility of the claimant for waiting period credit or benefits, or the imposition of a disqualification period or penalty, or the denial thereof, and of any nonattributability to the employer of the cause for which the claimant left his work, of such determination and the reasons thereof. Except as otherwise hereinafter provided in this Subsection regarding parties located in Alaska, Hawaii and Puerto Rico, unless the claimant or such employer within ten (10) days after such notification was mailed to his or its last known address, or otherwise delivered to him or it, asks a hearing before a referee thereon, such decision shall be final and benefits shall be paid or denied in accordance therewith. With respect to notice of disputed administrative determination or decision

mailed or otherwise delivered to the claimant or employer either of whom is located in Alaska, Hawaii or Puerto Rico, unless such claimant or employer within fifteen (15) days after such notification was mailed to his or its last known address or otherwise delivered to him or it, asks a hearing before a referee thereon, such decision shall be final and benefits shall be paid or denied in accordance therewith. If such hearing is denied the request therefor shall be filed with the board in writing within the prescribed periods as above set forth in this Subsection and shall be in such form as the board may prescribe. In the event that a hearing is requested, the payment of any disputed benefits with respect to the period prior to the final determination or decision shall be made only after such determination or decision. Benefits with respect to any week not in dispute shall be paid promptly regardless of any appeal.

(f) No person shall participate on behalf of the Division in any case in which he is an interested party.

(g) Solely on the ground of obvious administrative error appearing on the face of an original determination, and within the benefit year of the affected claims, the Director, or a representative authorized by the Director to act in his behalf, may reconsider and direct the deputy to revise the original determination so as to correct the obvious error appearing therein. Time for filing an appeal and requesting a hearing before a referee regarding the determinations handed down pursuant to this Subsection shall begin on the date following the date of revision of the original determination and shall be filed with the board in writing within the prescribed periods as above set forth in Subsection (c) of this Section.

42 U. S. C. § 503

(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of

such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; and

(2) Payment of unemployment compensation solely through public employment offices or such other agencies as the Secretary of Labor may approve; and

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied; and

(4) The payment of all money received in the unemployment fund of such State (except for refunds of sums erroneously paid into such fund and except for refunds paid in accordance with the provisions of section 1606(b) of Title 26), immediately upon such receipt, to the Secretary of the Treasury to the credit of the unemployment trust fund established by section 1104 of this title; and

(5) Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 1606(b) of Title 26: *Provided,* That an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration: *Provided further,* That the amounts specified by section 1103(c) (2) of this title may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administra-

tion of its unemployment compensation law and public employment offices; and

(6) The making of such reports, in such form and containing such information, as the Secretary of Labor may from time to time require, and compliance with such provisions as the Secretary of Labor may from time to time find necessary to assure the correctness and verification of such reports; and

(7) Making available upon request to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of unemployment compensation, and a statement of such recipient's rights to further compensation under such law; and

(8) Effective July 1, 1941, the expenditure of all moneys received pursuant to section 502 of this title solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of such State law; and

(9) Effective July 1, 1941, the replacement, within a reasonable time, of any moneys received pursuant to section 502 of this title, which, because of any action or contingency, have been lost or have been expended for purposes other than, or in amounts in excess of, those found necessary by the Secretary of Labor for the proper administration of such State law.

(b) Whenever the Secretary of Labor, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law, finds that in the administration of the law there is—

(1) a denial, in a substantial number of cases, of unemployment compensation to individuals entitled thereto under such law; or

(2) a failure to comply substantially with any provision specified in subsection (a) of this section;

the Secretary of Labor shall notify such State agency that further payments will not be made to the State until the Secretary of Labor is satisfied that there is no longer any

such denial or failure to comply. Until he is so satisfied he shall make no further certification to the Secretary of the Treasury with respect to such State: *Provided,* That there shall be no finding under clause (1) until the question of entitlement shall have been decided by the highest judicial authority given jurisiction under such State law: *Provided further,* That any costs may be paid with respect to any claimant by a State and included as costs of administration of its law.

(c) The Secretary of Labor shall make no certification for payment to any State if he finds, after reasonable notice and opportunity for hearing to the State agency charged with the administration of the State law—

(1) That such State does not make its records available to the Railroad Retirement Board, and furnish to the Railroad Retirement Board at the expense of the Railroad Retirement Board such copies thereof as the Railroad Retirement Board deems necessary for its purposes; or

(2) That such State is failing to afford reasonable cooperation with every agency of the United States charged with the administration of any unemployment insurance law.

Aug. 14, 1935, c. 531, Title III, § 303, 49 Stat. 626; June 25, 1938, c. 680, § 13(g), 52 Stat. 1112; June 30, 1939, c. 227, § 18, 53 Stat. 848; Aug. 10, 1939, c. 666, Title III, § 302, 53 Stat. 1378; 1946 Reorg. Plan No. 2, § 4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Aug. 10, 1946, c. 951, Title IV, § 416(c), 60 Stat. 991; 1949 Reorg. Plan No. 2, § 1, eff. Aug. 20, 1949, 14 F.R. 5225, 63 Stat. 1065; Aug. 28, 1950, c. 809, Title IV, § 405(b), 64 Stat. 560; Aug. 5, 1954, c. 657, § 5(a)(1), 68 Stat. 673.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1119

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Appellants,

vs.

ESSIE B. BURNEY,

Appellee.

Brief for the State of California as Amicus Curiae

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I

INTEREST OF AMICUS

This case concerns the validity of certain statutes and regulations utilized by the State of Indiana to administer its unemployment insurance program. The claimants are persons who were initially ruled eligible for unemployment insurance benefits, but who thereafter failed to qualify when seeking to prove eligibility for a particular week.

In brief, the Indiana procedure requires a claimant to present facts for each week that he claims benefits, which show that he has been available for work, has not refused suitable work, did not in fact work, etc. These facts are evaluated following administrative procedures which, while they do not amount to a judicial type hearing, nevertheless afford a claimant full due process. The California statutes and procedures are virtually identical to those employed in Indiana. See footnote 3, *infra.*

The impact of this court's decision in the instant case, however, will be greater on California than on Indiana or for that matter than on most states of the Union. California processes and pays about 15 percent of the nation's unemployment insurance claims.[1] In 1969, in California alone, there were some 116,000 claimants who would fall into the class of plaintiffs here. We estimate that the financial impact on the State of California, should plaintiffs prevail here, would be in the neighborhood of $50 million per year, including unrecoverable benefits paid to ineligible recipients and increased administrative costs.[2]

California's interest becomes even more pressing because of the pendency of *California Department of Human Resources Development v. Crow,* Ninth Circuit # 26749. In the latter case a single Federal District Court judge examined the California procedures in the area under consideration here and ruled that they violated due process.

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1. Handbook of Unemployment Financial Data, 1938-1970 (1971), U.S. Department of Labor, Manpower Administration.

2. It is extremely difficult to estimate precisely the dollar amounts involved in cases of this type. We are not unmindful of the fact that this court has questioned such estimates in the past. See dissenting opinion of Justice Brennan in *Richardson v. Wright,* ..... U.S. ....., 92 S.Ct. 788, 797, 31 L.Ed.2d 151 (1972); nevertheless we believe the figure set forth at least reflects the correct order of magnitude.

325 F.Supp. 1314 (N.D.Cal. 1970). The Department appealed to the Ninth Circuit but before the matter was argued in that court, this court agreed to hear the instant case. Because of the similarity between this case and *Crow*, we petitioned this court for certiorari in *Crow*, at the same time asking that *Crow* be consolidated with this case. Our petition for certiorari and our motion to expedite and consolidate were denied. Oral argument on *Crow* was thereafter had in the Ninth Circuit and on July 17 that court filed the following order,

> "Submission of this case for decision is postponed pending action by the Supreme Court of the United States in the case of *Indiana Employment Security Division v. Burney*, 172, ... U.S. ....., or until further order by the court."

Thus, this court's decision here, whether based on the Social Security Act or on due process considerations, will have a crucial effect on the Ninth Circuit's disposition of the appeal in *Crow*.

THE INDIANA PROCEDURES FOR DETERMINING WEEKLY CLAIMS ASSURE FAIRNESS TO THE CLAIMANT

When a claimant initially applies for unemployment insurance benefits, the procedures used by the Indiana Department of Employment Security are essentially those which were set forth by this court in *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971).[3] This court's summary of the procedures is as follows:

---

3. While we do not have access to the Indiana Department of Employment Security Manual, plaintiffs have conceded that the procedures are identical to those described by this court in *Java*. See plaintiff's motion to affirm, p. 3, fn. 2. Hence, while the discussion on this point will be in the context of California procedures, the relevance to Indiana is manifest.

"A claimant, appearing at an unemployment insurance office to assert a claim initially is asked to fill out forms which, taken together, indicate the basis of the claim, the name of the claimant's previous employer, the reason for his unemployment, his work experience, etc. The claimant is asked to return to the office three weeks later for the purpose of receiving an Eligibility Benefits Rights Interview. The issue most frequently disputed, the claimant's reason for termination of employment, is answered on Form DE 1101, and the Department immediately sends copies of this form to the affected employer for verification. Meanwhile the employer is asked to furnish, within 10 days, 'any facts then known which may affect the claimant's eligibility for benefits.' . . . If the employer challenges eligibility, the claimant may then be asked to complete Form DE 4935, which asks for detailed information about the termination of claimant's previous job. The interviewer has, . . . the 'responsibility to seek from any source the facts required to make a prompt and proper determination of eligibility.' . . . 'Whenever information submitted is not clearly adequate to substantiate a decision, the Department has an obligation to seek the necessary information.' . . . This clearly contemplates inquiry to the latest employer, among others.

"The claimant then appears for his interview. At the interview, the eligibility interviewer reviews available documents, makes certain that required forms have been completed, and clarifies or verifies any questionable statements. If there are inconsistent facts or questions as to eligibility, the claimant is asked to explain and offer his version of facts.

"The interviewer is instructed to make telephone contact with other parties, including the latest employer, at the time of the interview, if possible. . . . Interested persons, including the employer, are allowed to confirm, contradict, explain, or present any relevant evidence. . . .

> "The eligibility interviewer must then consider all the evidence and make a determination as to eligibility. Normally, the determination is made at the conclusion of the interview. . . . However, if necessary to obtain information by mail from any source, the determination may be placed in suspense for 10 days after the date of interview, or, if no response is received, no later than claimant's next report day. . . ."

This court ruled that this interview procedure is the critical determination made by the Department, observing that all parties had notice and an opportunity to be heard. Hence, the court reasoned, if the Department makes a finding of eligibility following the utilization of the described procedures, that finding should be implemented immediately. The court stated that payments were due when the only administrative determination outstanding was a finding of eligibility. An automatic suspension of such benefits merely because an employer has filed an appeal would violate the Social Security Act.

In the instant case, we are not concerned with the circumstances surrounding the initial finding of eligibility.[4] Mrs. Burney had already been found eligible initially and benefits became "due." We would point out, however, that the mere fact that she was found initially eligible did not mean that benefits would continue to be due, that she would automatically qualify for benefits from week to week. She could not sit back in otiose complacency and simply wait for her weekly check. Quite the contrary. In order to qualify for weekly benefits after the initial finding

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4. We are here only concerned with the plaintiff Burney. We believe that the lower court correctly decided that the Indiana procedures were violative of *Java* insofar as they were used to deny benefits to plaintiff Hiatt.

of eligibility, she was required to fulfill weekly obligations. She was required to undertake affirmative acts. Each week she was required to search for suitable work, to be available for work, to accept any valid offer of work, etc. These weekly claims are individual and discrete.[5] Each is based on the conduct of the claimant during the week for which she seeks benefits. These weekly determinations are obviously made on the basis of new factual circumstances which could not have been considered at the original eligibility interview. *New York State Department of Labor v. Torres,* 333 F.Supp. 341 (S.D. N.Y. 1971), affirmed ..... U. S. ..... (February 23, 1972).

Unfortunately, the lower court here has lumped these two types of determinations together, failing utterly to perceive the critical distinction between them. Slip Opinion 9. The importance of the distinction is apparent. In *Java,* the interviewer had ruled initially that the claimant was eligible, thus triggering the commencement of benefit payments. Here the interviewer ruled that the claimant was *ineligible* for a particular week. In both cases, the claimant had the benefit of comprehensive and fair administrative procedures.[6] The difference is that in *Java* the Department was compelled to pay because the only outstanding determi-

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5. For example, section 1253 of the California Unemployment Insurance Code states, "An unemployed individual is eligible for unemployment compensation benefits with respect to *any week* only if the Director finds that: (a) a claim for benefits with respect to *that week* has been made in accordance with authorized regulations . . . [etc.]" (Emphasis added.) The Legislature could hardly be more explicit. Similar language was enacted by Congress in the District of Columbia. See District of Columbia Unemployment Compensation Act, Public Act No. 386, 74th Cong., as amended by Public Law 87-424.

6. The procedures used to decide initial eligibility are essentially the same as those used to decide individual weekly claims. The forms are different and the inquiry is different but the procedures used to arrive at an administrative decision are the same.

nation was one of *eligibility*. Here, however, following utilization of the same procedures, the Department concluded that the claimant was *ineligible*. Surely, under the principles of *Java,* where the only administrative determination is one of ineligibility, payments cannot be said to be due. It would be grossly unfair to permit a claimant to rely on the procedures as determinative when they result in a finding in his favor and to permit him to reject them as inadequate when the decision goes against him.

SINCE THE TERMINATION OF BENEFITS IS ACCOMPLISHED PURSUANT TO DUE PROCESS, BENEFITS ARE NO LONGER DUE

Mrs. Burney contends that once she has crossed the threshold of initial eligibility, the weekly examinations of her activity are merely part of one continuous claim. If that is so, then, goes the argument, before that continuing claim may be terminated in any particular week, a full hearing must be held. Mrs. Burney is wrong in her characterization. When she first applies for benefits, the Department must make an investigation entirely different from the one conducted at her subsequent weekly claims interviews. The initial eligibility examination concerns the reason she left her last employment, whether she was in a covered employment, whether she had adequate earnings in her base period, and similar factors. The weekly claims questionnaire, by contrast, generally seeks information only from the claimant directly. It asks whether the claimant worked during the week for which she claims benefits, whether she turned down work, whether she was available for work, whether she was unable to work, whether she affirmatively looked for work.

We do not believe, however, that it is critical for us to establish that the weekly claims are, in fact, precisely what the statute denominates them, viz., separate claims relat-

ing to individual periods of one week. We may concede arguendo that the claims are simply part of one continuous claim. We may further concede that if we view the weekly claims in this fashion payments continue to be due *unless* they are terminated following a due process hearing.[7] But it is at this point that our concessions end. It is our position that the claimant in Mrs. Burney's circumstances is afforded full due process before a decision is made to deny or "suspend" her benefits. In this connection, *Goldberg v. Kelly,* 397 U.S. 254 (1970) is, of course, the landmark decision and in order properly to appreciate its scope, we must examine what rights were denied in *Goldberg* and contrast the factual situation in that case with the facts present in the instant case.

In *Goldberg,* when a caseworker had doubts about a claimant's eligibility, he interrogated the welfare recipient and thereafter made a recommendation of termination to his supervisor in the welfare department. The proposed decision to terminate was made by the supervisor *ex parte* and without prior notice to the recipient. The recipient was thereafter notified in writing that he had seven days within which he could submit a written statement in support of his own position and could ask that the Department's decision be reviewed at a higher level. These writ-

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7. The decision below was based solely on the Social Security Act. In our view, however, the question of whether benefits are "due" overlaps due process considerations. Hence, we feel compelled to deal with the due process problem.

We might note in passing that in *California Department of Human Resources Development v. Crow,* now pending in the Ninth Circuit, # ....., the District Court (one judge) invalidated the California procedures on constitutional grounds. And in *Wheeler v. Vermont,* 335 F.Supp. 856 (D.Vt. 1972), the District Court (three judges) set aside Vermont procedures on *both* statutory and constitutional grounds. As noted earlier, the Ninth Circuit has issued an order deferring decision in *Crow* pending this court's decision in the instant matter.

ten documents were then evaluated by an official in the Department and if the decision was made to terminate benefits, the recipient was simply sent notice of that decision. See 397 U.S. at 258-259. Thus, the recipient had no opportunity to appear personally or to present his case orally or to confront or cross-examine witnesses.

This contrasts sharply with the procedures available to claimants here. In this case, the claimant may make a personal appearance—indeed several personal appearances—if she so desires. Oral presentations are encouraged and are the rule. The only so-called right which is missing is the right to confront and cross-examine witnesses and even as to this right, the Department procedures provide an equivalent right which guarantees that the claimant may meet and rebut all statements adverse to her position.

In *Goldberg,* this court indicated its awareness of the necessity of having procedures which can accommodate a huge administrative caseload while at the same time assuring speedy resolution of questions of eligibility. 397 U.S. at 267. Accordingly, the court stated:

> "We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the states or the federal government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process." 397 U.S. at 267.

The question is then what procedural safeguards must be made available to Mrs. Burney in order that she be guaranteed "rudimentary due process." Clearly a judicial trial-type hearing is not necessary. 397 U.S. at 266. *Dixon v. Alabama State Board of Education,* 294 F.2d 150 (5th Cir. 1961); *United States v. Barcley,* 452 F.2d 930 (8th Cir. 1971).

From a reading of this court's opinion in *Goldberg*, it would appear that basic due process must include at least the following:

1. The opportunity to be heard orally and in writing at a meaningful stage in the proceedings.

2. The right to prior notice and time to prepare a defense.

3. The right to appear personally with or without counsel before the official who determines eligibility.

4. The right to have the decision made by an impartial decision-maker.

5. The right to confront and cross-examine adverse witnesses.

We believe that the elements outlined above are all satisfied although the right to cross-examination is not afforded in its traditional form.

1. The Department affords the claimant an opportunity to be heard at a meaningful time and place. She is examined first by a determinations interviewer and any questions resulting from the information the claimant has provided concerning her activities during the prior week are elicited. At this stage, the interviewer has an obligation to solicit the claimant's point of view and to extract an explanation for any conduct which may lead to a disqualification. If it appears that documentary evidence—for example, a physician's statement—would support the claim, the claimant will be asked to submit it. Additionally, the claimant is invited to suggest witnesses to support his version of the facts. It should be noted that benefits of the doubt are resolved in favor of the claimant and the claimant does not have the burden of producing witnesses; the interviewer has the obligation of gathering evidence to support his decision.

2. When the claimant's explanation of whatever conduct may jeopardize his eligibility has the effect of dis-

qualifying her from benefits for that particular week, she is placed on notice that suspension of benefits will follow. If at this point the claimant desires more time or if the interviewer deems it necessary to acquire additional information, the decision on eligibility for the week in question is postponed.

3. Obviously, the claimant has the right to appear personally. Indeed, in most cases, she has the obligation of appearing personally. There may be more than one interview if the claimant wishes to come into the office and present additional information. The claimant is entitled to appear either with counsel or with a friend or representative (for example, a union representative). This opportunity is available at both the preliminary determination and the pre-appeal review stage.

4. The decision-maker hears the evidence and is impartial. The decision is made by the interviewer[8] purely on the basis of all the information available. If the claimant is dissatisfied with the determination by the initial interviewer, she can request further review and a "pre-appeal review" by a supervisor is conducted. The supervisor will interview the claimant, examine the records, obtain additional facts when necessary, and apply the law to the facts.

5. We come then to the matter of confrontation and cross-examination. While this right is not afforded the claimant in its conventional form, its equivalent is a standard part of the decision-making process.

Parenthetically, we would note there is usually no point to giving the claimant the opportunity to cross-examine. Generally the information upon which the determination is based comes from the claimant herself. For example, Mrs. Burney herself conceded that she would not accept the employment in question because of a transportation

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8. This key fact distinguishes this case from *Wheeler v. Vermont*, 335 F.Supp. 856, 860-861 (D.Vt. 1972).

problem. Appendix 31-32.[9] Thus there was no one to cross-examine. The claimant supplied facts which formed the basis for the Department's decision. No witnesses were required, nor was there any occasion for the claimant to meet adverse testimony by others. Cf. *Woodbury v. McKinnon*, 447 F.2d 839 (5th Cir. 1971).

There are, however, occasions where outside persons may be contacted. In that eventuality, the person is usually contacted while the claimant is present in the office. For example, suppose the claimant indicates that she may have turned down an offer of work. It may be appropriate for the Department to contact the firm which made the alleged offer to determine whether the offer was, in fact, one which the claimant was in a position to accept. Following telephone contact by the Department, the claimant will be told what was said by the putative employer and asked to explain or rebut. If anything, this procedure leans in favor of the claimant. She is given the last word, and may even be granted additional time within which to submit oral or documentary evidence to further support her version of the facts.

Thus the goal of cross-examination is accomplished: the claimant hears the evidence offered against her and is permitted to show that that evidence is lacking in accuracy or credibility.

The point is that not every conceivable set of circumstances justified hauling out the cumbersome machinery

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9. Mrs. Burney alleges that there are no buses running at 2 a.m. Accepting this as fact the Department, nevertheless, concluded that she was unavailable for work. Perhaps the Department was wrong in that conclusion but the salient point is that the conclusion was a legal one, not a factual determination. A full dress judicial type hearing would not have changed that conclusion; it would merely have elicited the information that buses weren't available. The *legal* conclusion could only be tested on appeal. Cf. dissenting opinion of Justice Brennan in *Richardson v. Wright*, ... U.S. ....., 92 S.Ct. 788, 793, 31 L.Ed.2d 151 (1972).

which attends a judicial type hearing. If the essential elements of due process are present, the fact that the procedures utilized are administratively expedient should not prejudice their use. Little is gained by lavish adherence to labels such as cross-examination and confrontation. Those terms are flexible and have meaning only in context. *Cafeteria & Restaurant Workers Union v. McElroy*, 376 U.S. 886 (1961). Here that context is an administrative program which processes thousands of claims every week. We submit that the procedures used by Indiana and California and most other states are tailored to administrative necessity, while at the same time guaranteeing to claimants the due process to which they are entitled. See *Richardson v. Wright*, ...U.S. ....., 92 S.Ct. 788, 31 L.Ed.2d 151 (1972); *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961); *Richardson v. Perales*, 402 U.S. 389, 406-407 (1971); and *FCC v. WJR*, 337 U.S. 265 (1948). See particularly *Rivas v. Cozens*, 327 F.Supp. 867 (N.D.Cal. 1971), pending before this court, No. 71-5780, where a three-judge district panel ruled that a driver's license may be suspended without a prior hearing. The court in the latter case specifically distinguished *Sniadach*,[10] *Goldberg* and *Java*. Cf. *Freeman v. Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969); *Ahern v. Board of Education*, 327 F.Supp. 1391 (D.Neb. 1971).

CONCLUSION

The Indiana procedures provide for payments when due within the meaning of the Social Security Act. But payments do not continue to be due irrespective of the acts of the claimant. The claimant must qualify each week, proving facts different from those involved in the finding of initial eligibility. These separate claims may be granted or denied

10. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

without a full hearing. If the court, however, chooses to view the weekly claims solely as part of one continuing claim, the procedures, nevertheless, must be held valid as they afford a claimant due process prior to suspension of benefit payments.

For the reasons stated, the District Court's decision should be reversed.

Dated: August 3, 1972

EVELLE J. YOUNGER
Attorney General

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Deputy Attorney General

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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1119

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Appellants,

v.

ESSIE D. BURNEY,

Appellee.

Supreme Court, U.S.
FILED
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Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

ETITION FOR LEAVE TO FILE BRIEF AMICI CURIAE

and

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT

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Appellants,

v.

ESSIE D. BURNEY,
Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

PETITION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 42(3) of this Court, permission is sought to file the attached brief since consent has been refused by the parties.

Petitioners are all employers doing business in Indiana with employees in Indiana for whom they make contributions under the Employment Security Act of the State, the statute involved in this appeal. Indiana Code 1971, 22-4-1-1, et seq.; Burns' Ind. Stat. Ann. 52-1525, et seq. The last two named Petitioners also have hundreds of members who are employers in Indiana and have employees in Indiana for whom such members make contributions under the aforesaid statute. The Petitioners are:

College/University Corporation, of Indianapolis, Indiana, a holding company owning insurance and other companies, employing 320 persons;

Danners, Inc., of Indianapolis, Indiana, operator of retail variety stores in Indiana, employing 1,323 persons;

Indiana Steel & Engineering Corporation, of Bedford, Indiana, manufacturer of overhead cranes, employing 45 persons;

LML Engineering and Manufacturing Corporation, of Columbia City, Indiana, manufacturer of grain drying and moistening equipment and pontoon boats, employing 84 persons;

Stewart-Carey, Inc., of Indianapolis, Indiana, distributor of paint, mirrors, wallpaper and other products, employing 127 persons;

Indiana State Chamber of Commerce, of Indianapolis, Indiana, employing 32 persons and with approximately 5,300 member companies; and

Indiana Manufacturers Association, of Indianapolis, Indiana, employing 13 persons and with approximately 1,700 member companies.

Each of the Petitioners has a favorable experience account under the aforesaid Indiana Employment Security

Act, which has resulted in each of Petitioners paying less than the maximum rate provided for in the Act for employers who do not have such a favorable experience rating. Indiana Code 1971, 22-4-11-2 to 3; Burns' Ind. Stat. Ann. 52-1535a and 52-1535b (Supp. 1972).

Under the decision of the lower court, if an employee is paid benefits in the interim pending a hearing and the hearing results in a decision unfavorable to the employee, the Petitioners' experience accounts would be charged with all such payments and remain so charged until it is finally determined that claimant has received benefits to which he was not entitled, at which time the account is relieved of such overpayment. IC 1971 22-4-13-1; Burns' Ind. Stat. Ann. 52-1537(d) (Supp. 1972). To the extent that such payments are not recovered, the employment security fund of the state could be reduced below the minimum level, thereby requiring an increase in the rate of tax on all employers to restore it. IC 1971 22-4-11-2; Burns' Ind. Stat. Ann. 52-1535a (c) (Supp. 1972). The "Unemployment Insurance Statistics" published monthly by the U.S. Department of Labor Manpower Administration, show that there is a lapse of time, as obviously there must be, between the denial of a claim and a review hearing. Such figures also show that in a substantial percentage of cases where monetary benefits have been initially allowed, there has been a subsequent reversal. In Indiana, recovery from employees of payments erroneously paid over a ten-year period was only 68.69% of the total. **Some Significant Statistics About Unemployment Insurance in Indiana**, March 1972, p. 13. Petitioners and all other employers likewise situated are, therefore, adversely affected by the decision of the lower court in this case in that their experience accounts could be charged with all payments where there has been a review or hearing resulting in reversal, and the inability to recover such erroneous payments causes the tax rate on employers to increase. Such charges to Petitioners and

others with favorable experience ratings could result in a substantial increase in rate of tax from as low as less than one per cent to as high as three and two-tenths per cent. Indiana Code 1971, 22-4-11-3; Burns' Ind. Stat. Ann. 52-1535b (Supp. 1972).

Petitioners, since they stand to be adversely affected financially by any affirmance of the lower court decision, therefore, have an interest separate and distinct from that of the named Appellants in the action who are simply charged with enforcement of the Act. Petitioners desire to present, and do present, in the attached brief the questions of law therein discussed which could affect them adversely financially, and which would concern appellants only as to procedural requirements.

Petitioners, therefore, respectfully request that the Court enter an order permitting the filing of the attached brief of *amici curiae*.

Respectfully submitted

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Appellants,

v.

ESSIE D. BURNEY,
Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT

INTEREST OF AMICI CURIAE

The interest of *amici curiae* fully appears in the petition for leave to file this brief. *Amici curiae* and all other employers in Indiana may be adversely affected by the decision of the lower court in the manner stated in the petition for leave to file this brief.

The concern of *amici curiae* is genuine, and increased rates for *amici curiae* and all other employers, if the lower

court decision is not reversed or drastically modified, is possible. The volume of cases handled by the Indiana Employment Security Division is tremendous.[1] A "prior due process hearing," undefined by the court below, if it involves all of the elements contended for by Appellee Burney (Appendix 45), would serve no purpose where, as here, there are no disputed facts. It would slow down administrative procedure, particularly when unemployment is on the rise and expedition of claims is most desirable. It would cause the number of appeals to soar when knowledge becomes current that payments would continue until final determination. It would invite as a counter-measure initial holdings against claimants to avoid the assertion of the failure to make payment "when due" argument. It would add wasteful administrative expense. It would afford no rights to claimants not now available under the rules and regulations, and procedures now in force. It would increase the amount of unrecovered payments with which employers are ultimately required to bear.

Amici curiae submit that neither the Federal Act (42 U.S.C., Sec. 503(a)(1), Appendix B of this brief) nor the Constitution (Amendment XIV) requires any different procedures than are now applied under the Indiana Act.

The **Torres** case is directly in point. **Torres v. New York State Department of Labor, et al.**, 321 F. Supp. 432 (U.S. Dist. Ct. S.D. N.Y. 1971); judgment vacated and remanded by this Court (1971), 402 U.S. 968, 29 L. ed. 2d 133; judgment reinstated 333 F. Supp. 341 (U.S. Dist. Ct. S.D. N.Y. 1971); judgment affirmed ... U.S. ..., 31 L. ed. 2d 228 (1972).

The judgment of the court below should be reversed.

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[1] The published statistics for Indiana in 1971 show 341,917 new claims, 2,310,657 contacts with claimants, and denial for one reason or another of 49,698 claims.

STATEMENT OF THE CASE

Appellee, Essie D. Burney, filed a motion to intervene as plaintiff in a cause initially filed by a Ronald M. Hiatt. Appendix 15-16. Leave was granted. Appendix 2. Mrs. Burney then filed a complaint as a member of a class under Rule 23, seeking an injunction against suspension of payments to her of benefits under the Indiana Employment Security Act without "a prior due process hearing" and "final determination," restoration "immediately" of benefit payments and a declaration that suspension of payments of unemployment insurance benefits without a prior due process hearing was "unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution." Appendix 17-23.

Only the intervening complaint and the judgment (Appendix Jurisdictional Statement A-1–A-11) entered on the intervenor's supplemental motion for summary judgment (Appendix 27-28) are involved in this appeal.

The facts were stipulated. Appendix 29-31.

THE FACTS INVOLVED

The defendants are the Indiana Employment Security Division, members of the Security Board, and the manager of the Fort Wayne branch where the Burney case was processed. Appendix 24-25. Mrs. Burney, a citizen and resident of Indiana, had been employed at the Holiday Inn in Fort Wayne, and her employment was terminated December 27, 1970. Appendix 24-25. She applied on January 7, 1971, for unemployment compensation insurance benefits at the Fort Wayne branch and was declared eligible. Appendix 25. She received her first benefits late

in January, and up to March 20 received ten weekly benefit checks of $40.00 each. Appendix 25. By notice dated March 26 she was advised that her benefits were suspended as of the week ending March 27. Appendix 25. The reason stated in the notice was:

> "Because the claimant is limiting and restricting the hours for which she is available for work, she is being held as not available for work as of week ending 3-27-71 and until such time as she enters the labor market and becomes available for all shifts of work." Appendix 32.

The notice also states:

> "During periodic interview of 3-24-71, claimant stated that, due to parental responsibilities, she was available for only first shift work." Appendix 32.

The issue involved, as shown by the notice, was "availability for work as of week ending 3-27-71." Appendix 32.

The court treated Mrs. Burney's Request for Admissions, to which no timely response was filed, as admitted (Appendix Jurisdictional Statement A-7), and on that basis stated that the deputy's conclusion in the notice "was based upon Mrs. Burney's failure to accept employment as a dishwasher from 5:00 p.m. to 2:00 a.m. because of transportation difficulties." Appendix Jurisdictional Statement A-8.

Mrs. Burney was granted a hearing before an appeals referee on July 1, 1971, and on July 13, 1971, the referee affirmed the ruling that Mrs. Burney was ineligible. Mrs. Burney then appealed the referee decision to the Review Board of the Division, which, on December 6, 1971, reversed the referee decision. Jurisdictional Statement p. 4.

The decision of the deputy (Appendix 32) and the appeal referee referred to above were contrary to the decision

in **Hacker v. Review Board of Indiana Employment Security Division,** ... Ind. App. ..., 271 N.E. 2d 191 (1971). The court there held that a claimant who restricted her availability for work to certain hours because of family responsibilities had not removed herself from the labor market so as to justify cutting off unemployment compensation. **Hacker** was decided June 30, 1971, but was not published in the advance sheets until after the referee's decision. The Board of Review followed **Hacker** which, by the time of its decision, had been published.

So, Mrs. Burney had a hearing and her right to benefits was restored. Her representation of a class and the broad decree and injunction remain although the issue as to Mrs. Burney has long since become moot.

THE DECREE AND INJUNCTION BELOW

The Court ordered, adjudged and decreed three things (Appendix, Jurisdictional Statement, A-10–A-11):

(1) It held that part of the Indiana Act (Burns' Ind. Stat. Ann. Secs. 52-1542a and 52-1542b (Supp. 1972), Appendix A this brief) invalid and inconsistent with Sec. 303(a)(1) of the Social Security Act (42 U.S.C. Sec. 503, Appendix B this brief) which provides that, in the event a hearing is requested, payment of disputed benefits shall not be made until after a final determination. (This section of the Indiana Act was changed by the Indiana General Assembly in 1972, and any questions as to it are now academic. See note to Appendix A of this brief.)

(2) It held the practice of suspending payments without "a prior, due process hearing" inconsistent with Sec. 303(a)(1) of the Social Security Act (42 U.S.C. Sec. 503, Appendix B this brief).

(3) It enjoined suspending benefits of any person who had been determined eligible for unemployment compensation "without a prior due process hearing."

The court denied defendants' motion to amend the decree by substituting "predetermination hearing" for "prior due process hearing." Appendix 34-43. Counsel for Mrs. Burney, in a memorandum opposing the defendants' motion to amend the decree, set forth their interpretation of "prior due process hearing." Appendix 44-47.

ARGUMENT

The court erroneously applied the Social Security Act and imposed vague restrictions not required by statute, decisions or the Constitution of the United States.

Benefit Rights Determined Weekly

The lower court misconstrued the nature of the initial determination and the weekly determinations. The Indiana Act provides:

> "When an individual files an initial claim the division shall promptly make a **determination of his status as an insured worker** . . ." (our emphasis) IC 1971 22-4-17-2; Burns' Ind. Stat. Ann. 52-1542a (Supp. 1972) (Appendix A this brief).

As the remaining portions of the section quoted indicate, this is simply a determination of whether the claimant is qualified under the Act, or, in other words, is an "insured worker" and thus entitled to make future claims to weekly benefits, and, if so entitled, the extent of the benefits. The initial determination of coverage is not a determination that anything is due to claimant at all. It simply is a determination that the claimant had prior employment which would qualify him and was not unemployed for reasons which would disqualify him. Appendix A this brief. The Act makes it clear that the entitlement to benefits is a weekly determination. Subsection (d) of the same section quoted in part above reads:

> "(d) **In addition to** the foregoing **determination of insured status** by the division, the **deputy shall, throughout the benefit period determine the claimant's eligibility with respect to each week for which he claims** waiting period credit or **benefit rights**, the

> validity of his claim therefor, . . . or may refer such claim to a referee, who shall make the initial determination with respect thereto in accordance with the procedure in IC 1971, 22-4-17-3 [Sec. 52-1542b] hereof." (Our emphasis) Appendix A this brief.

Not until each subsequent weekly determination is made does anything become due to claimant. What then becomes due is one week's payment and no more, since the Act provides that throughout the benefit period the claimant's eligibility shall be determined **"with respect to each week"** for which rights are claimed. The acts of virtually every other state contain similar provisions. Appendix C this brief. The provision for a weekly determination of benefits is consistent with the purpose of all employment security acts which were fostered and brought into being by the Social Security Act.

The legislative history of the Social Security Act is set forth in Appendix D. It is clear from the history that unemployment benefits are conditioned upon continued involuntary unemployment.

The interpretation by the lower court of "when due" in 42 U.S.C. 503(a)(1) (Appendix B this brief) is not consistent with the legislative purpose as indicated by the legislative history set forth in Appendix D, nor with the language of the Act itself.

First—The "when due" provision relates to a finding by the Secretary of Labor that the states' methods of administration are such as "to be reasonably calculated to insure full payment of unemployment compensation when due." There is nothing in the record to show that the Secretary of Labor has made a finding that the methods of administration in Indiana do not comply with 42 U.S.C. Sec. 503 (a)(1). On the contrary, the Indiana method of administration has, from the beginning, had the sanction required under this section.

Second—The provision of the Indiana Act requiring a determination of eligibility "with respect to each week" for which benefits are claimed during the "benefit period" (Appendix A, p. 2 this brief) is consistent with the Federal Act and is essential to the preservation of the integrity of the concept of unemployment compensation in both the Federal and State Acts, which is that only an eligible employee is to be compensated, and only if from week-to-week during the benefit period he remains eligible.

The statute spells out specifically what is required to remain eligible from week-to-week:

> "An unemployed individual shall be eligible to receive benefits **with respect to any week only if**: . . ." (our emphasis).
>
> (1) "He has made a claim for benefits . . ." IC 1971 22-4-14-1; Burns' Ind. Stat. Ann. 52-1538 (Supp. 1972).
>
> (2) "he has registered for work . . ." IC 1971 22-4-14-2; Burns' Ind. Stat. Ann. 52-1538a (Supp. 1972).
>
> (3) "he is physically and mentally able to work, is available for work and is found by the division to be making an effort to secure work . . ." IC 1971 22-4-14-3; Burns' Ind. Stat. Ann. 52-1538b (Supp. 1972).

The statute defines certain circumstances as cases of unavailability, including, but not limited to, some of the following: attending a regularly established school, college, university, hospital or training school; in full-time active military service; unemployment is due to pregnancy; failure without good cause to accept suitable employment.[2]

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[2] Cf. **Dandridge v. Williams**, 397 U.S. 471, 486, 25 L. ed. 2d 491, 502 (1970), where this court said that the State had a "legitimate interest in encouraging employment."

The decree of the court below enjoins the suspension of payments to any persons "without **a prior due process hearing**" who "have been determined eligible but subsequently ineligible pursuant to an administrative hearing." Appendix, Jurisdictional Statement, A-11. A person would become ineligible, under the Act, in any week that he goes back to work, is hospitalized, enters the military service, or dies. In all of these cases the sweeping lower court decree would require **a prior** due process hearing even though the fact which creates the ineligibility is obvious and undisputed.

A due process hearing including all of the elements asserted by Mrs. Burney's counsel (Appendix 44-46) makes no sense at all in cases where, as here, there is no dispute as to the facts. The only question was whether the employment offered Mrs. Burney was suitable[3] in light of undisputed facts about the job and Mrs. Burney's situation.

The lower court decree ignores the fact that no payments are due on any determination beyond a one-week period. It also, by requiring a prior hearing, in effect, extends payments beyond the week-to-week basis wherever a hearing cannot be held within a week. A claimant has ten days to appeal to a referee (IC 1971 22-4-17-2; Burns' Ind. Stat. Ann. 52-1542a (e) (Supp. 1972)), and fifteen days to appeal a referee's decision (IC 1971 22-4-17-3; Burns' Ind. Stat. Ann. 52-1542b). The notice required is five days before a referee or a board of review hearing (IC 1971 22-4-17-6; Burns' Ind. Stat. Ann. 52-1542e). There is thus built-in a minimum of thirty-five days' delay in appeal and notice time to reach the Board of Review, if all goes on schedule. Some such time period is neces-

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[3] The question of whether employment is suitable arises only three out of a thousand cases on the average. **Some Significant Statistics About Unemployment Insurance in Indiana,** March 1972, p. 11.

sary to give both employer and employee an opportunity to prepare and appear to be heard.

A claimant, simply by taking an appeal to a referee and the board of review, in a case where the facts are undisputed and totally without merit, gains a minimum of six weeks of payments. How significant the time element is becomes apparent in light of a statistic. The Indiana experience shows that the duration of unemployment on the average in the last ten years for each spell of unemployment has varied from a low of 3.9 weeks in 1969 to a high of 5.7 weeks in 1971. In the other eight years the average duration of unemployment was less than 5 weeks. So, return to employment terminates the vast majority of cases where claims are filed. **Some Significant Statistics About Unemployment Insurance in Indiana**, March 1972, p. 7. The notice and appeals period of 6 weeks thus exceeds the average unemployment period. If the lower court decision should stand, appeals would unquestionably increase the actual payment period. Coupled with the statistics on recovery of overpayments shown in the same volume (p. 13), which is only 68.69% in the last ten years, it becomes apparent that the lower court's decision opens the way to wholesale abuse of the appeal process with the possibility of substantial additional cost resulting to employers from rate increases resulting from unrecovered overpayments. Pending an appeal, the incentive for the claimant to actively seek employment would also be reduced.

The decree below effectively writes out of the Act the provisions that the determination of the right to benefits is for one week only.

Hearing Required by Federal Act Is Provided

The Federal Act does provide for a hearing:

"(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for

unemployment compensation are denied; . . ." 42 U.S.C. Sec. 503 (a)(3); Appendix B this brief.

The court below has read into the Federal Act the word "prior" which is not there and has substituted the nebulous undefined words "due process" for the word "fair." The Indiana Act does provide for the fair hearing required by the Federal Act.

The volume of claims is such that procedures are established in the Claims Manual for placing claimants into three groups for review of weekly benefits on the basis of whether their claims show (1) a firm attachment to the labor market, (2) no firm attachment to the labor market, and (3) need for clarification. The interview procedure and review periods are geared to what experience has shown to be the need for and time of review with a selective interview in each category. Claims Manual, Secs. 13720-13732. Apart from the mechanics for handling volume, the law and regulations do provide for protection of a claimant's rights and a fair hearing.

The Indiana Act requires a "prompt" determination of status upon filing of an initial claim, with written notice to the claimant of the determination of status. The claimant may ask for a hearing before a referee. IC 1971 22-4-17-2; Burns' Ind. Stat. Ann. 52-1542a (Supp. 1972). Throughout the benefit period "with respect to each week" for which benefits are claimed, a determination is made as to benefit rights. IC 1971 22-4-17-2; Burns' Ind. Stat. Ann. 52-1542a (d) (Supp. 1972). In cases of disqualification notice to claimant is required and hearing before a referee may be had by claimant. IC 1971 22-4-17-2; Burns' Ind. Stat. Ann. 52-1542a (e) (Supp. 1972). Any person participating in a hearing must be disinterested. IC 1971 22-4-17-2; Burns' Ind. Stat. Ann. 52-1542a (f) (Supp. 1972). The decision of a referee may be appealed to the

Review Board. IC 1971 22-4-17-3, 22-4-17-5; Burns' Ind. Stat. Ann. 52-1542b, 52-1542d (Supp. 1972).

Regulations adopted pursuant to the Act provide as to the hearing before the referee:

> "All hearings shall be conducted informally in order to determine the substantial rights of the parties. The parties may present such evidence as the referee deems necessary for determining the substantial rights of the parties. The parties to the appeal may appear in person, by attorney, or duly authorized agent or representative, and shall have the right to examine their own witnesses, present evidence and cross-examine witnesses of the opposing party." Burns' Ind. Administrative Rules and Regulations, 52-1542b-1.

Other provisions of the same section are designed to assure informality and fairness, and representation of a party.

The same kind of regulations pertain to the Review Board hearing, including the right to have counsel and have an agent or representative of a labor organization to appear for claimant. Burns' Ind. Administrative Rules and Regulations, 52-1542e-4 and 5.

A Claims Manual issued by the Indiana Employment Security Division specifies in great detail all the matters relating to the rights of a claimant of which he must be informed at the first interview on a claim. Claims interviewers are abjured:

> "**Reason for the interview.** A statement of the purpose of the interview and an explanation of the claimant's rights and responsibilities under the law should be made. The importance of the claimant understanding everything that is expected of him while he is in claimant status should be stressed. He should be en-

couraged to ask questions on any point which is not clear." Unemployment Compensation Claims Manual, Sec. 13712.

The entire thrust of the manual is to assure fair handling and fair hearing with the fullest assistance to claimants in making claims or appeals.

In the initial **Torres** case (321 F. Supp. 432), the court reviewed the procedures required under New York law. An initial "Determination of Entitlement" is made in New York which corresponds to the determination of status in Indiana and there is a subsequent determination of the right to weekly payments. A hearing is provided for in New York following any week claimant was declared ineligible. These procedures were held adequate to "comport with minimum standards of due process." (pp. 437-8) The court also found no violation of 42 U.S.C. 503 (a) (1) (p. 438).

The New York Act, in its basic aspects, is similar to the Indiana Act. The finding of the Secretary of Labor referred to in **Torres** is fully applicable to the Indiana Act before the Court in this case. (p. 438) The record does not show that the Secretary of Labor has taken any different position as to Indiana.

The Indiana Act provides for the kind of hearing required by the Federal Act. The lower court was in error in requiring any different hearing than that now provided for by the statute and the regulations under it.

Java Is Not Controlling

In **California Department of Human Resources v. Java**, 402 U.S. 121, 28 L. ed. 2d 666 (1971), the claimant had been initially determined to be eligible for unemployment compensation and had received payment of some benefits. Upon a belated protest by the claimant's former employer,

the payments to the claimant were automatically terminated until an evidentiary hearing could be held to determine the validity of the employer's protest. Although the district court found this procedure violative of the due process clause and the Social Security Act, the Supreme Court abstained from determining the constitutional issue and decided only the statutory question. This Court held that denying benefits to otherwise eligible claimants automatically upon an employer's protest under the circumstances contravened the mandate of 42 U.S.C. 503 (a) (1). Appendix B this brief. The key to the Court's decision is found in the following quotation from Chief Justice Burger's opinion:

> "It would frustrate one of the Act's basic purposes —providing a 'substitute' for wages—to permit an employer to ignore the initial interview or fail to assert and document a claimed defense, and then effectuate cessation of payments by asserting a defense to the claim by way of appeal. If the employer fails to present any evidence, he has in effect defaulted, and neither he nor the State can with justification complain if, on a prima facie showing, benefits are allowed." 402 U.S. 134.

The issue in the instant case is significantly different from the issue in **Java.** It involves no belated employer's protest and no automatic suspension of payments at the time found to be due.[4] It involves a case where the finding is that payments are not due. The finding of "not due" was predicated upon the employee's own act. Though the questions as to the effect of Mrs. Burney's act were erroneously decided and the issue now mooted as to her, the question

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[4] The Indiana Act was amended in 1972 to provide for continuance of payments in the event of an appeal by the employer or the division. IC 1971 22-4-17-2; Burns' Ind. Stat. Ann. 52-1542a (e) (Supp. 1972), Appendix A this brief, see note at end.

stated is the one remaining on behalf of the class she purports to represent. The question really is the one decided in **Torres v. New York State Department of Labor**, 321 F. Supp. 432 (S.D.N.Y. 1971); vacated 402 U.S. 968, 29 L. ed 2d 133; reinstated 333 F. Supp. 341; affirmed 31 L. ed. 2d 228 (1972), already discussed above.

In **Torres** there was no automatic termination of benefits. The district court reasoned that in **Torres** the procedures complied with due process. Emphasizing that the same procedures were followed in denying benefits as were followed in initially granting benefits, the court concluded that these procedures were reasonably calculated to insure full payment when due. The claimant was afforded an opportunity to explain and support his claim for benefits before any action was taken, and he was provided with a statutory means of appealing adverse decisions. Finally, the court pointed out that in **Torres** ineligibility was founded upon the basis of new facts admitted by claimant. These new facts rendered claimant ineligible, and, thus, no payment was due. In **Java**, payments due were suspended automatically, without affording the claimant an opportunity even to orally present his position. **Torres** and this case are thus inapposite to **Java** because Indiana procedures are like those of New York.

The Indiana Claims Manual makes it clear that at the first suggestion of a question as to the right to benefits, the claims taker refers the claimant to a deputy for the necessary fact finding. Sec. 13620 provides:

> "The benefit rights interview will have thoroughly acquainted the claimant with the import and content of the statement which he will be required to sign as part of his certification with respect to each week for which he is making a claim. The statement contains all of the elements pertinent to questions of availability and capability. Therefor it is unnecessary to

question the claimant in detail to the same effect with respect to each certification. Consequently, the normal continued claim function will be reduced to:

a. Ascertaining answers to the following questions:

(1) Did you work anywhere last week? If so, what were your earnings?

(2) Did you refuse an offer of work?

b. Exploring any obvious question of the claimant's ability to work.

At any time in the accepting of a claim that a potential issue of eligibility or disqualification arises, the claims taker will refer the claimant to a deputy for the necessary fact finding."

(Our emphasis) Claims Manual, Sec. 13620.

The claimant, if the meeting with the deputy results in a disallowance, has the rights of appeal alluded to in this brief. The Claims Manual requires that in the first interview:

"The claimant must be properly informed of his right to appeal any adverse decision by the Division affecting his benefit rights." Claims Manual, Sec. 13712.

Other factors also distinguish **Java.** The first is the administrative feasibility of holding, on notice, a due process hearing for each claimant with a contested claim each week. Determination must be made weekly to insure payment only to the eligible claimants and to deny payment to the ineligible claimants. Changes in status can and do occur. Imposing the requirement of formal hearings **each week** for each contested claim would be a burden impossible to meet, particularly in case of mass layoffs or major unemployment, and would significantly

undermine the whole unemployment compensation system. It would invite initial holdings of no eligibility in such periods of stress.

The decision in this case would require a hearing before benefits could be suspended even if claimant were rehired, during the benefit period, on his old job at his former rate of pay.

Neither public policy nor the Federal Act requires such a result. The employee, if a determination as to any week is erroneous, is paid in full on final determination.

Due Process of Law Provided

Torres is sufficient answer that the procedures afforded under the Indiana law "comport with minimum standards of due process." **Torres v. New York State Department of Labor, et al.**, 321 F. Supp. 437-438. Those procedures have already been described in this brief, and, in addition to those described, there is the right of appeal to the courts from the decision of the Review Board. IC 1971 22-4-17-12; Burns' Ind. Stat. Ann. 52-1542k. The Court, in **Torres**, of due process said:

> "Claimants participate in an application interview, weekly benefit rights interviews, periodic reinterviews and, as needed, claim adjustment interviews. Information which the agency has received is investigated and brought to the claimant's attention at these interviews. Finally, a full due process hearing is provided, with both administrative and judicial review, and any determination favorable to the claimant results in fully retroactive payments." 321 F. Supp. 438.

The judgment in **Torres** was vacated by this Court and remanded for reconsideration in light of **Java** (402 U.S.

968, 29 L. ed. 2d 133). On remand, the lower court adhered to its prior decision (333 F. Supp. 341) and this Court affirmed that adherence (31 L. ed. 2d 228).

Nothing really needs be added to what was said in **Torres** and the decisions referred to therein.

CONCLUSION

We respectfully submit that this Court should reverse the lower court and hold the Indiana procedure to be in conformity to 42 U.S.C. 503 (a) (1) and (3), and not a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted

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APPENDIX A

Indiana Statute on Claims for Benefits

ARTICLE XVIII—CLAIMS FOR BENEFITS

52-1542 IC 22-4-17-1. Regulations prescribed by the board.—Claims for benefits shall be made in accordance with such regulations as the board may prescribe:

* * * * * * *

IC 22-4-17-2

52-1542a. Examination and determination of claims—Notice to claimant and employer—Request of hearing before referee—Authority of deputy—Determination revised upon obvious error.—(a) When an individual files an initial claim **the division shall promptly make a determination of his status as an insured worker**, in a form prescribed by the board. A written notice of the determination of insured status shall be furnished him promptly. Each such determination shall be based on and include a written statement showing the amount of wages paid to him for insured work by each employer during his base period and shall include a finding as to whether such wages meet the requirements for him to be an insured worker, and, if so, the week ending date of the first week of his benefit period, his weekly benefit amount, and the maximum amount of benefits that may be paid to him for weeks of unemployment in his benefit period. For the individual who is not insured, the notice shall include the reason for the determination. Unless the individual, within ten [10] days after such determination was mailed to his last known address, or otherwise delivered to him, asks a hearing thereon before a referee, such determination shall be fined [sic.] and benefits shall be paid or denied in accordance therewith.

(b) The division shall promptly furnish each employer in the base period whose experience or reimbursable account is potentially chargeable with benefits to be paid to such individual with a notice in writing of his benefit liability. Such notice shall contain the date, the name and social security account number of the individual, the ending date of his base period and the week ending date of the first week of his benefit period. Such notice shall further contain information as to the proportion of benefits chargeable to the employer's experience or reimburseable acount in ratio to the earnings of such individual from such employer. Unless the employer within ten [10] days after such notice of benefit liability was mailed to his last known address, or otherwise delivered to him, asks a hearing thereon before a referee, such determination shall be final and benefits paid shall be charged in accordance therewith.

(c) An employing unit, including an employer, having knowledge of any facts which may affect an individual's eligibility or right to waiting period credits or benefits, shall notify the division of such facts promptly in accordance with regulations prescribed by the board.

(d) **In addition to** the foregoing **determination of insured status** by the division, the **deputy shall, throughout the benefit period determine the claimant's eligibility with respect to each week for which he claims** waiting period credit or **benefit rights**, the validity of his claim therefor, and as the case may be the attributability to the employer of the cause for which the claimant left his work, or may refer such claim to a referee, who shall make the initial determination with respect thereto in accordance with the procedure in IC 1971, 22-4-17-3 [§ 52-1542b] hereof.

(e) In cases where the claimant's benefit eligibility or disqualification is disputed, the division shall promptly

notify the claimant and the employer or employers directly involved or connected with the issue raised as to the validity of such claim, the eligibility of the claimant for waiting period credit or benefits, or the imposition of a disqualification period or penalty, or the denial thereof, and of any nonattributability to the employer of the cause for which the claimant left his work, of such determination and the reasons thereof. Except as otherwise hereinafter provided in this subsection regarding parties located in Alaska, Hawaii and Puerto Rico, unless the claimant or such employer within ten [10] days after such notification was mailed to his or its last known address, or otherwise delivered to him or it, asks a hearing before a referee thereon, such decision shall be final and benefits shall be paid or denied in accordance therewith. With respect to notice of disputed administrative determination or decision mailed or otherwise delivered to the claimant or employer either of whom is located in Alaska, Hawaii or Puerto Rico, unless such claimant or employer within fifteen [15] days after such notification was mailed to his or its last known address or otherwise delivered to him or it, asks a hearing before a referee thereon, such decision shall be final and benefits shall be paid or denied in accordance therewith. If such hearing is desired the request therefor shall be filed with the board in writing within the prescribed periods as above set forth in this subsection and shall be in such form as the board may prescribe. [In the event a hearing is requested by an employer or the division after it has been administratively determined that benefits should be allowed to a claimant, entitled benefits shall continue to be paid to said claimant unless said administrative determination has been reversed by a due process hearing.] Benefits with respect to any week not in dispute shall be paid promptly regardless of any appeal.

(f) No person shall participate on behalf of the division in any case in which he is an interested party.

(g) Solely on the ground of obvious administrative error appearing on the face of an original determination, and within the benefit year of the affected claims, the director, or a representative authorized by the director to act in his behalf, may reconsider and direct the deputy to revise the original determination so as to correct the obvious error appearing therein. Time for filing an appeal and requesting a hearing before a referee regarding the determinations handed down pursuant to this subsection shall begin on the date following the date of revision of the original determination and shall be filed with the board in writing within the prescribed periods as above set forth in subsection (c)[e] of this section. [Acts 1947, ch. 208, § 1802, p. 673; 1953, ch. 177, § 22, p. 626; 1955, ch. 317, § 10, p. 971; 1965, ch. 190, § 11, p. 348; 1969, ch. 300, § 5, p. 1256; 1971, P. L. 355, § 42, p. 1376; 1972, P. L. 174, § 2, p. 844.] (Our emphasis.)

Note: The sentence in brackets in (e) above came into the law by an amendment by the Indiana General Assembly in its 1972 session, and effective April 1, 1972. Prior to that date the bracketed sentence reads as follows:

> "In the event that a hearing is requested, the payment of any disputed benefits with respect to the period prior to the final determination or decision shall be made only after such determination or decision."

The change was made in view of the decision of the court in **California Department of Human Resources v. Java**, 402 U.S. 121, 28 L. ed. 2d 666 (1971).

APPENDIX B

Federal Statute

42 USC § 503

§ 503. State laws, provisions required; stopping payments on failure to comply with law

(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—

(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due;

* * * * * * *

(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied;

* * * * * * *

APPENDIX C

Statutes of Other States

Virtually every state in the nation confines unemployment compensation to weekly benefits, requires that eligibility be determined weekly, and denies benefits to those claimants who have rendered themselves ineligible during the preceding week.

Ala. Code Tit. 26, Secs. 208, 213-14 (Suppl. 1969);

Alaska Stat., Secs. 23.20.340, 23.20.380, 23.20.350 (1962);

Ariz. Rev. Stat. Ann., Secs. 23-7718-776 (Supp. 1972);

Ark. Stat. Ann., Secs 81-1104 and 81-1106 (Supp. 1971);

Cal. Unempl. Ins. Code, Secs. 1253 and 1257 (West Supp. 1972);

Colo. Rev. Stat. Ann., Secs. 82-4-2 and 82-4-7 (Perm. Cum. Supp. 1969);

Conn. Gen. Stat. Ann., Secs. 31-228, 31-235, 31-236 (Supp. 1972-1973);

Del. Code Ann. Tit. 19, Secs. 3313-15 (Cum. Supp. Pamphlet 1970);

Fla. Stat. Ann., Secs. 443.04(2), 443.05(3), 443.06(2) (Supp. 1972-1973);

Ga. Code Ann., Secs. 54-605, 54-609, 54-610 (Supp. 1971);

Hawaii Rev. Laws, Secs. 383-23, 383-29(3), 383-30(3) (Supp. 1971);

Idaho Code Ann., Secs. 72-1312, 72-1366 (Supp. 1969);

Ill. Ann. Stat. Ch. 48, Secs. 401, 420, 433 (Smith-Hurd Supp. 1972);

Iowa Code, Secs. 96.3 to 96.5 (Supp. 1971);

Kan. Stat. Ann., Secs. 44-704 to 44-706 (Supp. 1971);

Ky. Rev. Stat., Secs. 341.350, 341.370, 341.380 (Supp. 1972);

La. Rev. Stat., Secs. 1592, 1600, 1601 (Supp. 1972);
Me. Rev. Stat. Ann., Secs. 1191 to 1193 (Supp. 1971);
Md. Ann. Code Art. 95A, Secs. 3, 4(c), 6(d) (Supp. 1971);
Mass. Gen. Laws ch. 151A, Secs. 23, 24(b), 25(c) (Supp. 1971);
Mich. Comp. Laws, Secs. 27, 28(c), 29(c) (Supp. 1971);
Minn. Stat., Secs. 268.07 to 268.09 (Supp. 1971);
Miss. Code Ann., Secs. 7374, 7378, 7379 (Supp. 1971);
Mo. Rev. Stat., Secs. 288.038, 288.040, 288.050 (Supp. 1972);
Mont. Rev. Codes Ann., Secs. 87-103, 87-105, 87-106 (Supp. 1971);
Neb. Rev. Stat. Secs. 48-624, 48-627, 48-628 (Supp. 1972);
Nev. Rev. Stat., Secs. 612.340, 612.375, 612.390 (Supp. 1971);
N.H. Rev. Stat. Ann., Secs. 282.2 to 282.4 (Supp. 1971);
N.J. Rev. Stat., Secs. 43:21-3 to 43:21-5 (Supp. 1971);
N.M. Stat. Ann., Secs. 59-9-3 to 59-9-5 (Supp. 1972);
N.Y. Labor Law, Secs. 590, 591.2, 593.2 (McKinney Supp. 1971);
N.C. Gen. Stat., Secs. 96-12 to 96-14 (Supp. 1971);
N.D. Cent. Code, Secs. 52-06-01, 52-06-02, 52-06-04 (Supp. 1971);
Ohio Rev. Code, Secs. 4141.29, 4141.30 (Supp. 1971);
Okl. Stat. Tit. 40, Secs. 213 to 215 (Supp. 1971);
Ore. Rev. Stat., Secs. 657.150, 657.155, 657.176 (Supp. 1971);
Pa. Stat., Secs. 401, 402, 404 (Supp. 1971);
R.I. Gen. Laws Ann., Secs. 28-44-6, 28-44-12, 28-44-20 (1970);
S.C. Code Ann., Secs. 68-104, 68-113, 68-114 (Supp. 1971);
S.D. Compiled Laws Ann., Secs. 61-6-1, 61-6-2, 61-6-15 (Supp. 1971);

Tenn. Code Ann., Secs. 50-1322 to 50-1324 (Supp. 1972);
Tex. Rev. Civ. Stat. Ann. Arts. 5221b-1 to 3 (1971);
Utah Code Ann., Secs. 34-4-3, to 35-4-5 (Supp. 1971);
Vt. Stat. Ann., Secs. 1338, 1343, 1344 (Supp. 1971);
Va. Code Ann., Secs. 60.1-48, 60.1-52, 60.1-58 (Supp. 1972);
Wash. Rev. Code, Secs. 50.20.120, 50.20.010, 50.20.080 (1970);
W. Va. Code Ann. Secs. 21A-6-1, -3, -10 (Supp. 1972);
Wis. Stat., Secs. 108.04 to 108.05 (1967);
Wyo. Stat. Ann., Secs. 27-24 to 27-26 (Supp. 1971).

APPENDIX D

. . . . . .

Excerpts from the Legislative History of the Social Security Act

The purpose of the Social Security Act is clear from its legislative history. The unemployment portions of it were designed to assist those involuntarily unemployed for a limited period during which they actively sought employment. The system was to be a state system with wide discretion left to the states.

The report of the Committee on Finance on the Social Security Bill to the United States Senate, on May 20, 1935, made abundantly clear the purpose of the Act:

> "The essential idea in unemployment compensation is the creation of reserves during periods of employment from which compensation is paid to workmen who lose their positions when employment slackens and who cannot find other work. Unemployment compensation differs from relief in that payments are made as a matter of right, not on a needs basis, **but only while the worker is involuntarily unemployed.** In all compensation systems the period during which compensation is payable is limited in some relation to the previous period of employment. Invariably there is a waiting period immediately following unemployment during which no compensation is payable. Thereafter compensation is paid as a stated percentage of the previous wage, customarily with both a minimum and a maximum rate. **Payment of compensation is conditioned upon continued involuntary unemployment. Beneficiaries must accept suitable employment offered them or they lose their right to compensation.** After a specified

period of time the compensation is discontinued in any event. (Our emphasis.)

. . . . . .

"This bill does not set up a Federal unemployment compensation system. What it seeks to do is merely to make it possible for the States to establish unemployment compensation systems and to stimulate them to do so.

. . . . . .

"Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, **the States are left free to set up any unemployment compensation system they wish, without dictation from Washington.** (Our emphasis.)

. . . . . .

. . . "In accordance with the entire spirit of the Social Security Act, we believe that the Federal Government should not attempt to dictate to the States which type of unemployment compensation law they should adopt."

Report No. 628, United States Senate Accompanying H.R. 7260, 74th Congress, 1st Session.

The report of the Committee on Ways and Means on H.R. 7260 to the House on April 5, 1935, is to the same effect:

"The essential idea in unemployment compensation, more commonly but less accurately called 'unemployment insurance' is the accumulation of reserves in times of employment from which partial compensation may be paid to workers who become unemployed and **are unable to find other work.** Un-

employment insurance cannot give complete and unlimited compensation to all who are unemployed. Any attempt to make it do so confuses unemployment insurance with relief, which it is designed to replace in large part. It can give compensation only for a limited period and for a percentage of the wage loss. (Our emphasis.)

. . . . . .

"**The bill permits the States wide discretion with respect to the unemployment compensation laws they may wish to enact.**" (Our emphasis.)

Report No. 615, House of Representatives Accompanying H.R. 7260, 74th Congress, 1st Session.

Prior to the above reports on H.R. 7260, the Finance Committee of the United States Senate had received the Report of the Advisory Council to the Committee on Economic Security, dated December 18, 1934, which dealt in part with the subject of unemployment compensation. Pertinent portions of this report are:

"The States for their part must assume responsibility for State administration. Unemployment compensation benefits must necessarily be locally administered and no large bureaucracy in Washington need be created if this principle is observed. Subject to necessary minimum standards prescribed in the Federal law, wide latitude should be allowed the States to experiment with respect to the particular form and provisions of the unemployment compensation laws which they may enact."

The report recommended what the state laws should contain as to types of unemployment to be benefited and not to be benefited, and eligibility requirements:

"A. **Types of unemployment benefited.**—(1) Total loss of weekly wages caused by lack of work, or par-

tial loss of weekly wages caused by lack of work amounting over a 4-week period to an average of more than 50 percent of the normal full-time weekly earnings.

"(2) Unemployment occurring in the regular work season of the year in trades in which regularly recurrent periods of slackness occur (the uncompensated slack periods to be designated by the competent administrative agency).

"B. **Types of unemployment not benefited.**—(1) Unemployment of persons directly engaged in trade disputes for duration of dispute.

"(2) Unemployment caused by discharge for proved misconduct.

"(3) Voluntary quit without reasonable cause may be uncompensated entirely or for such period as the plan may designate.

"(4) Unemployment during which workmen's compensation or other compulsory cash benefits are received.

"C. **Eligibility.**—1. Fulfillment of the following qualifying periods:

"(a) Employment of not less than 40 weeks in 24 months preceding claim.

"(b) Employment not less than 10 weeks after maximum duration of benefits in a 12-month period is drawn.

"2. Registration at public-employment office or other designated place and at times stated.

"3. Able to work and available for work.

"4. Unable to find suitable employment."

SEP 23 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1119

Supreme Court, U.S.
FILED
OCT 24 1972
MICHAEL RODAK, JR., CLERK

INDIANA EMPLOYMENT SECURITY DIVISION, *et al.*,
Appellants,

—against—

ESSIE B. BURNEY,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA FORT WAYNE DIVISION

MOTION FOR PERMISSION TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF NATIONAL EMPLOYMENT LAW PROJECT, *ET AL.* AS *AMICI CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, *et al.*,

Appellants,

—against—

ESSIE B. BURNEY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

MOTION FOR PERMISSION TO FILE BRIEF *AMICI CURIAE*

The National Employment Law Project, Community Action for Legal Services, Inc. of New York, the Legal Aid Bureau, Inc. of Baltimore, the Legal Aid Bureau of Buffalo, Inc., the Legal Aid Society of Cleveland, the Legal Aid Society of Metropolitan Denver, the Legal Services Center of Seattle, the Michigan Legal Services Assistance Program and the Neighborhood Legal Aid Society, Inc. of Richmond respectfully move this Court for leave to file the accompanying Brief *Amici Curiae*. The consent of the Appellee to the filing of this brief has been obtained, but the Appellants have refused to consent to its filing.

The *amici* are interested in this case because each of the *amici* is a Legal Services Office (hereafter "Legal Services Office") funded by the United States Office of Economic Opportunity and each devotes its full time to the representation of indigent individuals. Indigent clients bring numerous unemployment insurance cases to Legal Services Offices, often after benefits have been terminated without hearing, with the result that Legal Services Offices devote a very substantial amount of time to the representation of indigent unemployment insurance recipients.*

The summary termination of unemployment insurance benefits works a major hardship on these unemployment insurance recipient clients. Because the average wage in the United States in employment covered by unemployment insurance was but $141.09 per week in 1970,** and because, when one becomes unemployed, this income is replaced with a benefit which, in 1970, equalled, on the average, but 35.7% of the earned wage*** and because even this modest benefit is eliminated by summary benefit terminations, the *amici* frequently find themselves representing desperately

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* In Maryland, when unemployment insurance recipients receive notice of adverse action they also receive a notice (Form FSA-801) informing them that they may be entitled to free legal assistance, together with the addresses of the offices of the *amicus*, Legal Aid Bureau, Inc. of Baltimore.

Approximately 25% of the case load of the National Employment Law Project is made up of unemployment insurance matters in which it is cooperating with local Legal Services Offices.

** See United States Department of Labor *Handbook of Unemployment Insurance Financial Data 1938-1970* (hereafter *"1971 Handbook"*) at 139 (1971).

*** *1971 Handbook* at 139.

poor clients whose benefits have been terminated without a hearing.

The summary termination of benefits imposes additional financial burdens on those whose financial resources are greatly reduced by unemployment. The additional legal impediment imposed by shifting to the recipient the burden of securing a reversal of a summary adverse decision cannot be justified in these circumstances. For these reasons the *amici* urge affirmance of the decision below.

Respectfully submitted,

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Appellants,

—against—

ESSIE B. BURNEY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

BRIEF OF THE NATIONAL EMPLOYMENT LAW PROJECT, *ET AL.*, AS *AMICI CURIAE*

Interest of the *Amici*

The interest of the *amici* is fully set out in the Motion for Permission to file this Brief *Amici Curiae*. *Amici* are Legal Services Offices, funded by the United States Office of Economic Opportunity. Because *amici* represent indigents, exclusively, they devote a substantial amount of time to representing unemployment insurance recipients.

Summary of Argument

In *California Department of Human Resources Development* v. *Java*, 402 U.S. 121 (1971), this Court concluded that 42 U.S.C. §503(a)(1), which requires the payment of unemployment insurance benefits "when due," operates to prevent the states from terminating unemployment insurance payments when an employer demands a hearing. The court below has correctly interpreted *Java* to require the Appellants to conduct hearings prior to the termination of benefits previously found due. That court's decision was correct because:

(1) Unemployment insurance benefits are a statutory entitlement in which recipients have a property right.

(2) Congress, in adopting the unemployment insurance program, manifested its concern that benefits be paid as soon as possible after unemployment begins and during the period of unemployment. These objectives are frustrated by the long delay between a decision to terminate and a testing of the correctness of that decision in a hearing. Congress required that such hearings be "fair hearings" [See 42 U.S.C. §503(a)(3)], and thus has compelled the states to provide due process hearings which are, by definition, prior hearings.

(3) Informal and summary proceedings such as those presently in use in Indiana are not adequate to satisfy the requirement that benefits be terminated only in fair hearings.

The decision of the court below should also be affirmed because the Fourteenth Amendment to the United States

Constitution requires hearings prior to unemployment insurance benefit terminations and the present summary procedure used by the Appellants for such terminations does not meet the requirements of that Amendment.

ARGUMENT

I.

The termination of unemployment insurance benefits without a prior hearing violates controlling provisions of the Social Security Act.

A. *The Requirements of the Social Security Act.*

This Court has repeatedly recognized that states receiving reimbursement for social welfare programs pursuant to the Social Security Act must conform to the requirements of the Act in administering those programs. See, e.g., *Carleson* v. *Remillard*, —— U.S. ——, 92 S. Ct. 1932 (1972); *Townsend* v. *Swank*, 404 U.S. 282 (1971); *Rosado* v. *Wyman*, 397 U.S. 397 (1970); *King* v. *Smith*, 392 U.S. 309 (1968). And, in *California Department of Human Resources Development* v. *Java*, 402 U.S. 121 (1971), it has specifically applied that principle to states administering programs under Title III of the Act, which establishes unemployment insurance benefits.

In *Java*, of course, the Court dealt with one section of the Act at issue in this case and held that that section, §303(a)(1), operates to prevent the states from terminating unemployment insurance benefits upon a mere demand for a hearing by an employer.

Section 303(a) provides that the Secretary of Labor shall not certify payment of funds for the administration of a

state unemployment insurance program unless the law of that state includes provision for:

> "(1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due."
>
> • • • • •
>
> "(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." Social Security Act §303(a) [42 U.S.C. §503(a)].

In commenting on Section 303(a)(1) in *Java,* this Court stated:

> "Other evidence in the legislative history of the Act and the commentary upon it supports the conclusion that 'when due' was intended to mean at the earliest stage of unemployment that such payments were administratively feasible after giving both the worker and the employer an opportunity to be heard." 402 U.S. at 131.

In the case at bar, the Appellee has successfully challenged, in the court below, the practice of the Indiana Employment Security Division of terminating unemployment insurance benefits, already found to be "due," within the meaning of the Act and *Java,* without first holding a hearing. The decision of the court below was correct because:

> (1) Unemployment insurance is a statutory entitlement which becomes "due" when there has been an initial determination of eligibility.

(2) The requirement that benefits must be paid "when due" and the requirement that persons denied unemployment insurance be given "fair hearings" operate to require a hearing prior to termination.

(3) The present procedure for determining an issue of continuing eligibility does not provide the prior fair hearing contemplated by the Social Security Act.

B. *Unemployment Insurance Is a Statutory Entitlement and Property Right Which Becomes "Due" When There Has Been an Initial Determination of Eligibility.*

When the Social Security Act was first brought to the floor of the House in 1935, the then Chairman of the House Ways and Means Committee had the following to say about the unemployment insurance program:

> "The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of our population and its loss of self-respect. *The protection afforded by social insurance comes to the worker as a matter of right.* It is contingent upon the previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief." 79 Cong. Rec. 5468 (1935) (remarks of Representative Doughton) (emphasis supplied).

Unemployment insurance was also characterized as a "contractual right" when it was introduced. See Report of the Committee on Economic Security, *Hearings on S. 1130 before Senate Comm. on Finance*, 74th Cong. 1st Sess. at 321-22 (1935) [hereafter cited as *"1935 Hearings"*].

As recently as 1970, Congress, addressing the Employment Security Amendments of 1970 (Pub. L. No. 91-373, 84 Stat. 695), reiterated this basic concept of unemployment insurance:

> "The Committee believes that the disqualification provisions of State unemployment compensation laws should be devised so as to prevent benefit payments to those responsible for their own unemployment, without undermining the basic objective of the unemployment insurance system—to provide an income floor to those whose unemployment is beyond their control. *Severe disqualifications, particularly those which cancel earned monetary entitlement, are not in harmony with the basic purposes of an unemployment insurance system.* Most disqualifications under State law provisions are applied for voluntary terminations without good cause (frequently cause must be attributable to an employer), or for refusals of suitable work. Such a situation may represent an error in judgment on the part of the worker, or be the result of circumstances over which he had no control. The penalty for a disqualifying act should not be out of proportion to the disqualifying act." *Report of the Senate Finance Comm. on the Employment Security Amendments of 1970,* S. Rep. No. 91-752, 91st Cong., 2d Sess. at 24.

Virtually identical language appears in the *Report of the House Comm. on Ways and Means on the 1970 Employment Security Amendments.* H.R. Rep. No. 612, 91st Cong., 1st Sess. at 19.[1] Congress in 1970, as in 1935, viewed unem-

[1] It is worthy of note that the provision curtailing the ability of the states to completely cancel unemployment insurance credits to which both the Senate and House Committees were addressing themselves was eventually enacted. See Int. Rev. Code of 1954 §3304 (a)(10).

ployment insurance, even more than the AFDC program (42 U.S.C. §§601 *et seq.*) at issue in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), as a matter of statutory right. Accordingly, Congress requires payment of benefits "when due" and the states implement this requirement by providing for an initial determination of eligibility that initiates benefit payments. See *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 127 (1971).

Indiana, like other states, follows the Social Security Act and creates a statutory entitlement to benefits. The court below specifically found that the initial determination was the critical point in the Indiana procedure and that:

> "Even though defendants review on a weekly basis the eligibility of a claimant, the court finds that the concept of when benefits are 'due' under the Social Security Act does not change from week to week after a claimant has been found eligible and no prior, due process hearing has been held with regard to a subsequent finding of ineligibility. The court thus finds that plaintiff Burney's benefits were 'due' and could not be summarily suspended due to a deputy's determination of ineligibility under §52-1542a(d). Having been found eligible pursuant to the procedures set forth in §52-1542a, plaintiff Burney was entitled to benefits until defendants afforded her a hearing. To conclude otherwise would frustrate the purpose of early substitute compensation during unemployment under §303(a)(1) of the Social Security Act. See *Java, supra* at 1355." Memorandum of Decision and Order, Jurisdictional Statement at A-1, A-9–A-10.

Indiana has established a right to unemployment insurance, as it must, to conform to the Social Security Act. This

right is a statutory entitlement and a property right; it becomes due after there has been an initial determination of eligibility.

C. *The Requirements That Benefits Be Paid "When Due" and That Those Denied Benefits Be Given "Fair Hearings" Require Hearings Before Benefit Termination.*

1. Congress intended that unemployment insurance benefits would be paid during the period of unemployment to provide a source of income other than welfare for the unemployed, to stabilize the economy and to allow the unemployed to search for work.

As this Court has noted, in requiring that benefits be paid "when due," Congress intended that unemployment benefits be paid *during* the period of unemployment. *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 130 (1971). The Brief *Amicus Curiae* submitted by Harry T. Ice and Charles T. Todd on behalf of a group of Indiana employers, the Indiana State Chamber of Commerce and the Indiana Manufacturers Association (hereafter the "Employers") points out that the delay between benefit denial and the holding of a hearing and resolution of any appeal from the hearing decision is *longer* than the average period of unemployment in Indiana.[2] See

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[2] There is some disparity between the 5.7 weeks set out at p. 11 of the Employers' Brief *Amicus Curiae* as the average duration of unemployment during 1969 and the 8.2 weeks set out as the 1969 average in the *1971 Handbook* at 206. In any event, a substantial portion of the eligibility period is consumed awaiting a final adjudication of eligibility. In Indiana, 63.7% of the cases remained undecided 75 days after a request for hearing in the period January—March, 1972. United States Department of Labor, *Unemployment Insurance Statistics* at 9 (May 1972). The Indiana situation is not unique. In New York, in the period January to March, 1972, 74.2% of the cases in which hearings were sought involved delays in excess of seventy-five days, see United States

Employers' Brief *Amicus Curiae* at 11. From these statistics, the Employers conclude that the recipient should not be allowed to receive benefits pending the hearing because many recipients would thus be allowed to receive benefits throughout their periods of unemployment.[3] Employers' Brief *Amicus Curiae* at 11. Quite the contrary, these statistics demonstrate that those summarily terminated in Indiana do not receive *any* benefits during the very time that Congress intended that they should have benefits. Unemployment compensation was intended to provide compensation *during the period of unemployment.* Its purpose is to "... provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of his turning to private charity." *Java, supra,* 402 U.S. at 131-32. A lump sum award, after hearing and often after unemployment has ended, conflicts with this goal.

Congress intended to create an entitlement to benefits to be paid during periods of unemployment, Congress did not intend that those eligible for unemployment insurance would resort to welfare,[4] the inevitable result of the

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Department of Labor, *Unemployment Insurance Statistics* at 9 (May 1972); and the average duration of unemployment was 12.9 weeks during 1969 (13.6 weeks during 1970), *1971 Handbook* at 278.

[3] The period of time that elapses between the hearing and appeal is actually irrelevant since Appellees seek only one hearing prior to termination.

[4] See *supra* at p. 9. In *Torres* v. *New York State Department of Labor,* 321 F. Supp. 432, 437 (S.D.N.Y.), *vacated and remanded,* 402 U.S. 968, *opinion on remand,* 333 F. Supp. 341 (S.D.N.Y. 1971), *aff'd without opinion,* 405 U.S. 949, *petition for rehearing filed* (March 24, 1972), in its first opinion, the majority of the court relied heavily on the availability of welfare to those denied unemployment insurance benefits. See *infra* at p. 26.

denial of unemployment insurance to those without incomes adequate to the amassing of the savings necessary for self-support during periods of enforced unemployment.[5]

A further indication of the importance of this goal is found in the fact that Congress intended that benefits would be paid during periods of unemployment in order to stabilize the economy by maintaining the purchasing power of workers:

> "The chief merit of unemployment insurance, however, is that it will exert a profound influence upon the stabilization of industry . . . . The transfer of purchasing power by benefit payments when danger threatens will float the business ship off the shoals of depression to the seaway of prosperity." *1935 Hearings* at 2. (Statement of Senator Robert F. Wagner, Sponsor of the Social Security Act.)

This Court also noted, in *Java*, this central purpose of unemployment insurance and that this purpose was among those defeated by delayed compensation. 402 U.S. at 132-33.

Congress also emphasized its concern that benefits be paid during unemployment by articulating the principle that benefits should be used to allow the unemployed worker to search for work:

> "This [the Act] covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job.

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[5] The average income in employment covered by unemployment insurance was $141.09 in 1970 in the United States; in Indiana it was $143.81. *1971 Handbook* at 139.

We felt that in that period of 2½ to 3 months the beneficiaries should get an insurance benefit in cash." *Hearings on H.R. 4120 Before the House Committee on Ways and Means,* 74th Cong., 1st Sess. at 214 (1935) (statement by Harry L. Hopkins, Federal Emergency Relief Administrator).

The summary termination of benefits also contavenes this policy.

The long delay between a summary termination of benefits and the testing of the accuracy of that determination, in a hearing, defeats the goal of early payment of benefits during unemployment. Benefits are found to be due in the initial determination; Congress established a requirement that any denial of benefits be tested by a fair hearing [Social Security Act §303(a)(3)]; it did not intend that recipients, frequently eligible under the standards eventually applied in such hearings, would be forced to do without benefits due, often throughout the period of actual unemployment, while awaiting that test.

The policy of postponing payment of benefits pending the hearing required by the Act frustrates the three most important purposes of unemployment insurance: providing subsistence income during unemployment, stabilizing the economy and allowing maximum ability to search for work.

2. Congress intended that recipients be provided hearings prior to benefit termination.

Congress explicitly enjoined the states to provide:

"Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unem-

ployment compensation are denied . . . ." 42 U.S.C. §503(a)(3).

The phrase "fair hearing," as it is found in other Titles of the Social Security Act has been interpreted authoritatively by the United States Department of Health, Education and Welfare ("H.E.W.") to require a prior hearing. In Title III, unemployment insurance, the phrase has not been so interpreted by the United States Department of Labor.

Even before this Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), H.E.W. had proposed to interpret the fair hearing provisions of Titles I, IV-A, X, XIV, XVI and XIX of the Social Security Act to require continued payment of benefits pending the fair hearing decision. See 397 U.S. 254, 257 fn. 3. That interpretation has now been adopted, see 45 C.F.R. Part 205,[6] and judicially approved. *Almenares* v. *Wyman*, 334 F. Supp. 512 (S.D.N.Y.), *aff'd*, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972). Titles I, IV-A and X were each part of the original Social Security Act of 1935—as was Title III. Congress

[6] Each of the Titles of the Act to which the proposed regulation and the present 45 C.F.R. Part 205 apply contains a provision for a fair hearing. See Social Security Act §§2(a)(4) [42 U.S.C. §302(a)(4)] (Old Age Assistance), 402(a)(4) [42 U.S.C. §602(a)(4)] (Aid to Families with Dependent Children), 1002(a)(4) [42 U.S.C. §1202(a)(4)] (Aid to the Blind), 1402(a)(4) [42 U.S.C. §1352(a)(4)] (Aid to the Totally and Permanently Disabled), 1602(a)(4) [42 U.S.C. §1382(a)(4)] (Aid to the Aged, Blind or Disabled), 1902(a)(3) [42 U.S.C. §1396a(a)(3)] (Medical Assistance). Title II of the Act (Old-Age, Survivors, and Disability Insurance) does not use the phrase "fair hearing" but does require " . . . reasonable notice and opportunity for a hearing . . . ." Social Security Act §§205(b), 221(d) [42 U.S.C. §§405(b), 421(d)]. H.E.W. has not interpreted that provision to require a full due process prior hearing. See *Wright* v. *Richardson*, 405 U.S. 208 (1972).

could only have meant to use the phrase "fair hearing" consistently.

The traditional meaning ascribed to fair and due process hearings leads inevitably to the conclusion that Congress intended the interpretation adopted by H.E.W. In Black's Law Dictionary, the phrase "fair hearing" itself is defined as a hearing comporting with the requirements of due process. And in *Fuentes* v. *Shevin*, —— U.S. ——, 92 S. Ct. 1983 (1972), this Court said:

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a *fair process* of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract *fair play* to the individual." —— U.S. at ——, 92 S. Ct. at 1994 (1972) (emphasis supplied).

When applied to adjudicatory proceedings the terms "due process" and "fairness" have virtually identical meanings. A "fair" hearing normally is a due process hearing.

In *Fuentes* it was also said that:

> "This [the right to a prior hearing] is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing 'appropriate to the nature of the case,' *Mullane* v. *Central Hanover Tr. Co.*, 339 U.S. 306, 313, and 'depending upon the importance of the interests involved and the nature of the subsequent proceeding [if any],' *Boddie* v. *Connecticut*, 401 U.S. 371, 378,

> the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect." —— U.S. at ——, 92 S. Ct. at 1995 (1972) (parallel citations omitted).

A hearing, if it is fair, if it is a due process hearing, is conducted before property is forfeit. See, e.g., *United States* v. *Illinois Central R.R.*, 291 U.S. 457, 463 (1934) (hearing meets due process requirements if held before order effective); *Londoner* v. *City and County of Denver*, 210 U.S. 373 (1908) (right to a hearing prior to fixing of taxes); *Hovey* v. *Elliott*, 167 U.S. 409 (1897) (absence of power in court to ignore answer of party as punishment for contempt); *Windsor* v. *McVeigh*, 93 U.S. 274 (1876) (right to hearing prior to deprivation of real property). Each of these cases was decided prior to the enactment of the Social Security Act, with its provisions for "fair hearings." Each made explicit the underlying assumption of Anglo-American adjudicatory processes—the hearing comes first, the deprivation later. See, *e.g.*, 2 F. Pollock & F. Maitland, *The History of English Law* 591-597 (2d ed. 1959). Though the legislative history of the Social Security Act is silent on the question of what, specifically, Congress had in mind when it required a "fair hearing," Congress no doubt intended to have reference to the body of law establishing the parameters of fairness imbedded in the concept of due process.

The fact that Congress was allowing delegation of an adjudicatory function to an administrative agency offers no reason to think that it was not still to be precisely that—an adjudicatory function conducted in accordance with the

essential elements of that function; not the least of which is that adjudication occurs before taking. See *Londoner* v. *City & County of Denver, supra; Windsor* v. *McVeigh, supra.* That prior hearings remained a fundamental principle of due process fairness, even after administrative agencies achieved great vogue during the era of the New Deal, is clear from an early case dealing with another administrative proceeding established by New Deal legislation, the Fair Labor Standards Act:

> "The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126, 152-53 (1940).

In unemployment insurance the order becomes "effective" within the meaning of this rule when the unemployed worker, currently receiving benefits, ceases receiving benefits. Though there may later be a retroactive award of benefits withheld, the chance for compensation *during* the weeks of unemployment in which the denial was effective is lost forever.

Presumably, had Congress addressed the subject in more detail, it would have defined the fair hearing in a manner consistent with its own overriding concern with early payment of benefits during periods of actual unemployment and the long-standing tradition that a fair hearing is a prior hearing.

D. *The Present Procedure Used to Resolve an Issue of Continuing Eligibility Does Not Provide the Fair Hearing Contemplated by the Social Security Act.*

As will be seen in detail, *infra,* there are numerous guides to what constitutes a fair hearing in the context of due process. One of the most significant guides is found in *Goldberg* v. *Kelly,* 397 U.S. 254, 266 (1970): an adequate hearing is one held at a meaningful time with notice, personal appearance, cross-examination, oral presentation, option to be represented by counsel, decision based on legal rules and evidence and impartial decision-maker. The present informal interview procedures used in Indiana prior to benefit terminations do not meet these requirements. See *infra* at 29. Consequently, since Congress has required a "fair hearing" and since its model for a "fair hearing" must be found in due process hearings (see *supra* at 17), present Indiana pre-termination procedures are inadequate. While the necessity for early benefit payments justifies the less formal method of initiating benefit payments, see *California Department of Human Resources Development* v. *Java,* 402 U.S. 121, 131 (1971), there can be no justification for using such procedures to terminate benefit payments currently being made.

II.

The termination of unemployment insurance benefits without a due process hearing violates the Fourteenth Amendment to the United States Constitution.

A. *A Hearing Is Required Prior to Termination of Unemployment Benefits.*

On appeal, the Appellants and their *amici* attempt to distinguish *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), and to rely on *Torres* v. *New York State Department of Labor*, 321 F. Supp. 432 (S.D.N.Y.), *vacated and remanded*, 402 U.S. 968, *opinion on remand*, 333 F. Supp. 341 (1971), *aff'd without opinion*, 405 U.S. 949, *petition for rehearing filed* (March 24, 1972), for the proposition that a due process hearing is not required prior to the termination of unemployment insurance benefits. *Torres* relied on the theory that the due process requirement of a hearing prior to the termination of public assistance in *Goldberg* v. *Kelly*, *supra*, was based solely upon the "brutal need" of the recipients; that unemployment insurance recipients do not experience such "brutal need"; and that hearings, therefore, are not required prior to termination of unemployment insurance benefits. This theory has been specifically rejected by three United States District Courts[7] because

[7] The theory has been rejected by the three-judge courts in *Java* v. *California Department of Human Resources*, 317 F. Supp. 875 (N.D. Cal. 1970) *affirmed on statutory grounds*, 402 U.S. 121 (1971), and *Wheeler* v. *Vermont*, 335 F. Supp. 856 (D. Vt. 1971), and by a single-judge court in *Crow* v. *California Department of Human Resources*, 325 F. Supp. 1314 (N.D. Cal. 1970), *appeal docketed*, Nos. 71-1045 and 26740 (9th Cir. January 11, 1971), *motion to expedite and for consolidation with No. 71-1119 denied*, ——U.S. ——, 92 S. Ct. 2046, *cert. denied*, —— U.S. ——, 92 S. Ct. 2495, *order postponing judgment entered* (9th Cir. July 17, 1972).

it is based on a misunderstanding of decisions of this Court and the history of due process.

In determining whether a hearing must be given prior to the termination of an interest, this Court has traditionally followed a two-step process. First, in order "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Board of Regents of State College* v. *Roth,* —— U.S. ——, ——, 92 S. Ct. 2701, 2705-06 (1972) (emphasis in original). Second, once a protected interest has been found, a prior hearing is required unless there is found one of those " 'extraordinary situations' that justify postponing notice and opportunity for a hearing" until after the termination or taking has occurred. *Fuentes* v. *Shevin,* —— U.S. ——, ——, 92 S. Ct. 1983, 1999 (1972) (citation omitted). Thus, if the *nature* of the interest is sufficient to invoke due process protection, a hearing is constitutionally mandated prior to the termination of the interest unless an extraordinary situation dictates the postponing of such a hearing.

The nature of the interest in the instant case is the right to unemployment insurance benefits which have been determined to be due to the recipient. The nature of this interest was long ago held sufficient to invoke constitutional protections. *Sherbert* v. *Verner,* 374 U.S. 398 (1963). More recently, this Court, citing *Sherbert* v. *Verner, supra,* used unemployment insurance benefits as an example of a constitutionally protected interest:

> "Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation." *Goldberg* v. *Kelly,* 397 U.S. 254, 262 (1970) (citations omitted).

Indeed, this Court has determined that interests much less compelling than the right to receive unemployment benefits are subject to due process protections. In *Fuentes* v. *Shevin*, —— U.S. ——, 92 S. Ct. 1983 (1972) it was held that possessory interests in chattels (a stove and a stereo) were of sufficient import to invoke the protection of due process. In *Bell* v. *Burson*, 402 U.S. 535 (1971) it was held that possession of a driver's license was sufficient to invoke due process protections. And in *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) it was held that a person's reputation in the community was sufficient to invoke due process protections.

The second step in determining whether a prior hearing must be given rests upon a determination of whether or not there is an extraordinary situation necessitating an immediate taking of property and a postponement of notice and hearing. As stated in *Fuentes* v. *Shevin*, —— U.S. ——, 92 S. Ct. 1983, 1999 (1972) these extraordinary situations "must be truly unusual." Under the guidelines discussed by this Court, very few truly unusual situations have been found to necessitate the postponement of notice and hearing. See, e.g., *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (emergency protection of the public from misbranded drugs); *Fahey* v. *Mallonee*, 332 U.S. 245 (1947) (protection of the public against the economic disaster of a bank failure); *Phillips* v. *Commissioner of Internal Revenue*, 283 U.S. 589 (1931) (need of the government to promptly secure its revenues); *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554 (1921) (emergency needs to meet the national war effort); *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908) (emergency protection of the public from misbranded foods).

In sharp contrast to these extraordinary situations is the general principle that due process requires notice and hearing prior to the taking or termination of an interest. See, e.g., *Morrissey* v. *Brewer*, —— U.S. ——, 92 S. Ct. 2593 (1972) (notice and hearing prior to revocation of parole); *Fuentes* v. *Shevin*, —— U.S. ——, 92 S. Ct. 1983 (1972) (notice and hearing prior to repossession of household goods); *Stanley* v. *Illinois*, 405 U.S. 645 (notice and hearing prior to denial of guardianship to unwed father); *Bell* v. *Burson*, 402 U.S. 535 (1971) (notice and hearing prior to revocation of driver's license); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) (notice and hearing prior to labeling a person as a heavy drinker); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (notice and hearing prior to termination of public assistance benefits); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) (notice and hearing prior to wage garnishment); *Armstrong* v. *Manzo*, 380 U.S. 545 (1965) (notice and hearing prior to adoption by another of legitimate father's child); *Londoner* v. *City and County of Denver*, 210 U.S. 373 (1908) (notice and hearing prior to special tax assessment); cf. *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126 (1940); *United States* v. *Illinois Central R.R.*, 291 U.S. 457 (1934). In short, this Court "has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect." *Fuentes* v. *Shevin*, —— U.S. ——, ——, 92 S. Ct. 1983, 1995 (1972).

Despite the clear rationale of these decisions, the Appellants rest their case on an attempt to distinguish *Goldberg* v. *Kelly, supra*, through reliance on *Torres* v. *New York State Department of Labor, supra*, which in turn had held *Goldberg's* finding of the "brutal need" of public assistance

recipients was not applicable to unemployment insurance recipients. As noted pp. 21-22, *supra,* such a finding of brutal need is irrelevant to both the nature of the interest protected and the due process requirement of a *prior* hearing. If any doubt remained on this point, it was eliminated by the decision in *Fuentes* v. *Shevin, supra.* The lower courts in *Fuentes* had construed *Sniadach* and *Goldberg* narrowly as holding that due process required prior hearings only with respect to the deprivation of "necessary" items such as wages and public assistance benefits, —— U.S. at ——, 92 S. Ct. at 1998. Reversing the lower courts, this Court rejected their narrowly drawn rationale:

> "This reading of *Sniadach* and *Goldberg* reflects the premise that those cases marked a radical departure from established principles of procedural due process. They did not. Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect . . . . While *Sniadach* and *Goldberg* emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine.
>
> "Nor did they carve out a rule of 'necessity' for the sort of nonfinal deprivations of property that they involved. That was made clear in *Bell* v. *Burson, supra,* holding that there must be an opportunity for a fair hearing before mere suspension of a driver's license. A driver's license clearly does not rise to the level of 'necessity' exemplified by wages and welfare benefits. Rather, as the Court accurately stated, it is an 'im-

> portant interest,' entitled to the protection of procedural due process of law." —— U.S. at ——, 92 S. Ct. at 1998 (footnotes and citations omitted).

Even if "need" were to play a significant role in deciding whether or not unemployment insurance recipients are entitled to due process, need is, beyond doubt, present. First, this Court has noted that need is present in the unemployment insurance scheme. *California Department of Human Resources Development* v. *Java,* 402 U.S. 121, 130 (1971).

Second, unemployment insurance recipients receive low incomes, see n. 5, *supra,* and the unemployment insurance benefit itself is quite low. See *1971 Handbook* at 139. The result is that recipients reduce their expenditures, particularly expenditures for food [see P. Klein, *Financial Adjustments to Unemployment* 35, 50 (1965)], and the unemployed often suffer defaults on other obligations [see Note, *The Relationship of Unemployment to Mortgage Foreclosures,* 86 Monthly Lab. Rev. 1421-22 (1963)]. From the recipient's perspective, the need for support during unemployment makes very real the general social need that motivated the enactment of the unemployment insurance system:

> "It is sometimes said that unemployment insurance is not based on need. Stated thus, without qualification, the proposition contains a grave error. Unemployment insurance is a compulsory governmental program, and in our society we make use of governmental compulsion only when there is clear and urgent need for it.
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"If in 1935 we had not judged that there existed a need which individuals were incapable of meeting by themselves, unemployment insurance would not have been established. . . . " Becker, *The Adequacy of Benefits in Unemployment Insurance* in *In Aid of the Unemployed,* 80-81 (Becker ed. 1965).

Third, public assistance is an inadequate alternative to unemployment insurance. Of the federal categories of public assistance established by the Social Security Act and supported from general tax revenues, only one, Aid to Families with Dependent Children (42 U.S.C. §§601 *et seq.*) (hereafter "AFDC"),[8] is generally available to those who are capable of working.[9] In September, 1971, twenty-five states, including Indiana, did not make this program available to persons in families in which an unemployed father remained in the home. United States Department of Health, Education and Welfare, *Public Assistance Statistics,* at Table 8 (September, 1971). Consequently, the families of unemployed fathers would not be eligible for AFDC in those states. That this results in many denials to those whose unemployment insurance is terminated is suggested by the fact that, in the month of February, 1972, 67.2% of all unemployment insurance claimants were male. United States Department of Labor, *Unemployment Insurance Statistics,* at 17 (May, 1972). Moreover, eligibility for AFDC is conditioned

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[8] The categories other than AFDC are Old Age Assistance (Title I), Aid to the Blind (Title X), and Aid to the Permanently and Totally Disabled (Title XIV).

[9] It is also worthy of note that Congress in adopting this comprehensive social welfare program, specifically adverted to its intent that public assistance not be used to meet the needs of those eligible for unemployment insurance. See *supra* at 9.

on the presence of dependent children; those without children—including childless couples and single persons—do not qualify. Persons not covered by AFDC are thus forced to fall back on local, state and county or township "emergency relief," "general assistance" or "home relief" programs. In Indiana these programs are administered by townships. See Ind. Ann. Stat. §§52-139–52-199 (Burns 1964 Repl. 1971 Supp.). Such programs have been characterized as follows:

> "General Assistance is the last operating vestige of the poor laws in Public Assistance. Since the funds for this program come from local sources, for the most part, and since the local administering body can set the rules within very broad, if any, State legal limits, there is a marked absence of broad social purpose in the programs.
>
> "This type of aid often is the only resource for many temporarily or permanently unemployable persons and persons out of work who cannot qualify for Unemployment Insurance or whose benefits under that program are inadequate or have been exhausted. However, 4 States will not pay General Assistance to a family with an employable person in the household except in certain dire emergencies.
>
> "State and local GA programs are generally more limited than the Federally aided assistance programs as to the duration and the amount of assistance paid. In 12 States, only emergency or short term assistance is given; in 14 States, aid is restricted to defined special situations. In addition, six States limit the length of time an eligible person can get General Assistance. In

many others limitations are set from time to time because of limitations on available funds. A maximum is set on the amount of General Assistance that can be given to a needy person in 14 States. Average monthly payments for all the States reporting in April 1968 amounted to $45 monthly per recipient (ranging from $3.70 in Arkansas to $75 in Pennsylvania). Money payments are made in only about one-half of the State programs; the remaining use either vendor payments or both cash and vendor payments." President's Commission on Income Maintenance Programs (Heineman Commission, appointed 1968), *Background Papers*, 279 (1969).

Thus the reliance of the Appellants on *Torres* v. *New York State Department of Labor, supra,* is misplaced. Need is not a necessary prerequisite to the attachment of due process rights, and in any event need is a very real fact for the unemployment insurance recipient whose benefits are summarily terminated. Public assistance cannot, and Congress made the judgment that it should not, be used to meet this need.

B. *Indiana's Interview Procedure Does Not Satisfy the Requirements of Due Process.*

Appellants contend that Indiana's "summary interview" procedure[10] meets the requirements of due process.[11] They advance this argument despite strong authority

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[10] See *Indiana Employment Security Division—Unemployment Compensation Claims Manual* (hereafter "*Indiana Manual*") §13620.

[11] See Appellants' Brief p. 17. This contention is also advanced by the State of California at pp. 7-13 of its Brief *Amicus Curiae.*

to the contrary[12] and without regard to the requirements of due process.

The summary interview procedure followed in Indiana is similar to the interview procedure followed in most other states. The unemployment insurance recipient reports periodically[13] for an interview at the local claims office.[14] At this interview the recipient reports orally or in writing his efforts to obtain employment and the remuneration received if employment was obtained.[15] Prior to, during, or subsequent to the interview, the interviewer may obtain information from third parties concerning the recipient's eligibility for benefits.[16] The recipient may or may not be given notice of the existence of such information, and has no right to confront or cross-examine the party from whom the information was obtained.[17] Thereafter, on the basis of information submitted by the recipient and the information gathered from third parties and other sources,[18] the interviewer or another person[19] may terminate the benefits of

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[12] A similar argument has been rejected by the District Courts. See cases cited in n. 7, *supra; contra Torres* v. *New York State Department of Labor, supra.*

[13] In Indiana recipients report at intervals of once every five weeks or once every ten weeks depending upon their alleged "attachment" to the labor market. *Indiana Manual* §§13720-13732. In addition, the recipient reports weekly to claim his unemployment insurance—in this report he fills out a card that is normally taken at face value. See *Indiana Manual* §13620.

[14] In some states, personal appearances are not always required. See *Indiana Manual* §13628.

[15] *Indiana Manual* §§13511-13628, 13720-13732.

[16] *Indiana Manual* §17330. See also Appellants' Brief p. 18.

[17] *Indiana Manual* §§17330, 17331, 17332.

[18] *Id.*

[19] *Id.* See also *Indiana Manual* §12220.

the recipient.[20] After benefits have been terminated, the recipient may request a fair hearing before an impartial referee.[21]

The contrast between this summary interview procedure, and the requirements of due process is striking. While it is true that due process is a flexible concept, it is also true that the basic requisites of due process (notice, hearing, confrontation and cross-examination, representation if desired, a decision based on legal rules and evidence, and an impartial decision maker) must be provided. Notice and hearing are, of course, most fundamental: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin* v. *Hale,* 68 U.S. 223, 233, 1 Wall. 223, 233 (1863); see also *Grannis* v. *Ordean,* 234 U.S. 385 (1914); *Hovey* v. *Elliott,* 167 U.S. 409 (1897); *Windsor* v. *McVeigh,* 93 U.S. 274 (1876). It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). Additionally, the hearing must include the right to confront and cross-examine adverse witnesses. *Greene* v. *McElroy,* 360 U.S. 474, 496-97 (1959). And, of course, an impartial decision maker is required. *In re Murchison,* 349 U.S. 133 (1955).

In *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) this Court analyzed the elements of due process as they applied to termination of public assistance benefits. A review of those elements as articulated in *Goldberg* provides an appropriate comparison with the summary interview procedure at issue in the case *sub judice.*

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[20] *Id.*

[21] *Indiana Manual* §19000.

Adequate and prior notice of the proposed deprivation is, chronologically, the first element of due process. 397 U.S. at 267-68. Prior to the interview, *no* notice whatsoever is given to the unemployment insurance recipient stating, much less "detailing," the reasons for a proposed termination of benefits.[22] While the unemployment insurance recipient, like the public assistance recipient, is generally aware of the conditions of his eligibility,[23] specific notice that a question concerning eligibility has arisen occurs only when the summary interview session takes place.[24] This falls short even of basic fairness.

A second essential element of due process is the hearing itself and essential to the hearing is the right to confrontation and cross-examination. *Goldberg* v. *Kelly*, 397 U.S. at 269. The Court, quoting *Greene* v. *McElroy*, 360 U.S. 474, 496-97 (1959) to emphasize that confrontation and cross-examination were "particularly pertinent" to terminations of public assistance, concluded that public assistance recipients "must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department." 397 U.S. at 270. These requisites of confrontation and cross-examination are wholly absent from the unemployment insurance summary interview procedure at issue here. As noted at p. 30, *supra*, an unemployment insurance recipient either receives no advance notice of the taking of adverse testimony and hence has no opportunity

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[22] *Indiana Manual* §§17331, 17332.

[23] Both unemployment insurance recipients and public assistance recipients must meet minimal requirements in order to maintain their eligibility for their benefits. Compare *Indiana Manual* §§13620, 13712 [unemployment insurance] with 45 C.F.R. §206.10, 36 Fed. Reg. 3864 (February 27, 1971) [public assistance].

[24] See note 22 *supra*.

to confront or cross-examine the witnesses or the recipient receives a moment's notice while the witness is contacted by telephone.[25] Hence the recipient is given no opportunity to confront or cross-examine adverse witnesses.

This absence of opportunity to cross-examine was, in part, the reason that the California procedure was found inadequate in *Crow* v. *California Department of Human Resources, supra.* See 325 F. Supp. at 13, 18. It also contrasts with the social security benefit determination hearing described by this Court in *Richardson* v. *Perales,* 402 U.S. 389 (1971).[26] In *Perales,* not only was there opportunity for confrontation and cross-examination, but subpoena power was available to the claimant. 402 U.S. at 404-05.

Since many contested unemployment insurance benefit terminations hinge on questions of fact at issue between the recipient and the employer,[27] the right to confrontation and cross-examination is even more important in unemployment insurance than it is in welfare. Again, this aspect of unemployment insurance administration is at variance with

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[25] See Appellants' Brief at p. 18 where it is stated that "information and rebuttal is usually obtained by telephone."

[26] In *Richardson* v. *Perales,* 402 U.S. 389 (1971) this Court was concerned with the substantial evidence rule at a hearing determining the eligibility of a claimant for social security benefits and not with a benefit *termination* proceeding. Distinguishing the due process requirements surrounding the *termination* of benefits in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), Mr. Justice Blackmun, writing for the Court, made it clear that the Court in *Perales* was "not concerned with the termination of disability benefits once granted." 402 U.S. at 407.

[27] In Indiana, during the period January through March, 1972, 43.6% of the hearings involved an issue of whether or not the recipient voluntarily left his previous employment and 33.5% involved an issue of whether or not the claimant was discharged for misconduct. United States Department of Labor, *Unemployment Insurance Statistics* at 7 (May 1972).

the rationale of *Richardson* v. *Perales, supra.* In *Perales* this Court, dealing with a challenge to reliance on the written reports of physicians found no "bias to the work of these independent physicians, or any interest on their part in the outcome of the administrative proceeding beyond the professional curiosity a dedicated medical man possesses." 402 U.S. at 403. No dispassionate professionalism motivates the employer to challenge unemployment insurance eligibility.[28] Confrontation and cross-examination are essential.

Another element of a due process hearing is the requirement that there be an impartial decision maker. In *Goldberg* this Court stated that the administrator initially participating in the determination should not be the decision maker in the due process hearing. 397 U.S. at 271.[29] In contrast with this requirement, the summary interview procedure at issue here allows the interviewer or claims deputy who conducts the investigation to also be the deci-

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[28] The employer is not harmed by an erroneous payment of benefits since such payments are charged not to his account, but to the general account. See Ind. Ann. Stat. §52-1537(d) (Burns 1964 Repl. 1971 Supp.).

[29] This holding was most recently applied last term in *Morrissey* v. *Brewer,* —— U.S. ——, 92 S. Ct. 2593 (1972) where Mr. Chief Justice Burger, writing for the majority, stated:

> "In *Goldberg,* the Court pointedly did not require that the hearing on termination of benefits be conducted by a judicial officer or even before the traditional 'neutral and detached' officer; it required only that the hearing be conducted by some person *other* than one initially dealing with the case. It will be sufficient, therefore, in the parole revocation context, if an evaluation of whether reasonable cause exists to believe that conditions of parole have been violated is made by someone such as a parole officer other than the one who has made the report of parole violations or has recommended revocation." —— U.S. at ——, 92 S. Ct. at 2603 (emphasis in original).

sion maker.[30] Like the caseworker in *Goldberg,* the interviewer or deputy in unemployment insurance, who has "participated in making the determination under review," cannot also be the decision maker and meet the due process requirement of an impartial decision maker. 397 U.S. at 271.

The rights encompassed in the due process clause "were designed' to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972). Conspicuously absent from the summary interview procedure are the due process requisites of adequate and timely notice, a meaningful hearing at a meaningful time, an opportunity for confrontation and cross-examination of adverse witnesses, and an impartial decision maker. Such a procedure cannot discharge the function of a due process hearing.

[30] *Indiana Manual* §§17100, 17331, 17332.

CONCLUSION

A due process hearing is required by the United States Constitution and the Social Security Act when unemployment insurance benefits are terminated. Such a hearing is, by law, tradition and logic, a prior hearing.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, et. al.,
Appellants,

v.

ESSIE B. BURNEY,

Appellee.

**On Appeal From The United States District Court
For The Northern District of Indiana
Fort Wayne Division**

Brief of Appellee

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Becker, The Inadequacy of Benefits in Unemployment Insurance, In Aid of the Unemployed (1965) 33
California Department of Human Resources Development, Claimants Who Filed Valid New Claims, October 1966-September 1967, Report No. 416, No. 6, (1970) 34
California Department of Human Resources Development, Continued Claims Statement, DE 4581, Rev. 25 (Jan. 1972) 24
Clague, The Economics of Unemployment Compensation, 55 Yale L.J. 53 (1945) 22
4 Commerce Clearing House Unemployment Insurance Reporter, Indiana 43
79 Congressional Record (1935) 17
P. Douglas, Standards of Unemployment Insurance (1933) 36
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Harris, Claimant Views of Unemployment Insurance Administration in California, 4 Unemployment Insurance Rev. 2 (1967) 47
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Horowitz and Neitring, Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State, 15 U.C.L.A. L. Rev. 787 (1968) 38
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Indiana Employment Security Division, Some Significant Statistics About Unemployment Insurance in Indiana (March 1972) 35, 52
Katoma, et al., Survey of Consumer Finances (1970) 34
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New York State Department of Labor, Unemployment Insurance Beneficiaries (March 1970) 34
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Note, The Relationship of Unemployment to Mortgage Foreclosures, 86 Monthly Labor Rev. 1421 (1963) 35
Note, Withdrawal of Public Assistance: The Right to a Prior Hearing, 76 Yale L.J. 1234 (1967) 53
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S. Rep. No. 91-752, 91st Cong., 2nd Sess. (1970) 22
S. Rep. No. 628, 74th Cong., 1st Sess. (1935) 17, 18

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Stein, Special Labor Force Report: Work History, Attitudes, and Income of the Unemployed, 86 Monthly Labor Rev. 1405 (1963) 36
Thirty-Sixth Annual Report of the Indiana Employment Security Board, Employment Security in Indiana, 1971 (March 30, 1972) 14, 18, 41, 52, 53, 55
U.S. Bureau of the Census, Statistical Abstract of the U.S. (1970) 34
U.S. Code Congressional and Administrative News (1970) 22
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U.S. Department of Labor Unemployment Insurance Services, Office of State Operations, Guide to Unemployment Insurance Benefits Appeals: Principles and Procedures (1970) 27
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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, et. al.,
Appellants,

vs.

ESSIE B. BURNEY,
Appellee.

**On Appeal From The United States District Court
For The Northern District of Indiana
Fort Wayne Division**

Brief of Appellee

QUESTIONS PRESENTED

1. Whether the Indiana unemployment compensation procedure, which suspends the payment of unemployment compensation benefits to eligible recipients for several months pending an evidentiary hearing, violates the "when due" and "fair hearing" requirements of the Social Security Act, 42 U.S.C. § 503(a)(1) and (3).

2. Whether this Court's ruling in *Goldberg v. Kelly*, 397 U.S. 254 (1970) that a state must afford adequate notice and an evidentiary hearing prior to suspending or termi-

nating vitally needed government benefits applies to the state termination of unemployment compensation benefits, which this Court has found serve "to maintain the recipient at subsistence levels." *California Department of Human Resources Development v. Java,* 402 U.S. 121, 131-32 (1971).

STATEMENT OF THE CASE

This action was originally filed in the United States District Court by plaintiff Ronald M. Hiatt representing a class of persons who applied for unemployment compensation benefits, were determined eligible by the Indiana Employment Security Division [hereinafter the "Division"], and whose benefits subsequently were suspended pending an evidentiary hearing on an employer's appeal challenging their initial eligibility. The issue presented by plaintiff Hiatt was identical to the issue decided by this Court in *California Department of Human Resources Development v. Java,* 402 U.S. 121 (1971), which held that such suspensions violate the Social Security Act's requirement that state unemployment benefits be paid "when due". 42 U.S.C. § 503(a)(1). The court below ruled in favor of plaintiff Hiatt and his subclass on the basis of *Java,* and the Division has not appealed from that portion of the decision.

This appeal concerns the issues presented by an intervening plaintiff, Essie B. Burney, and the subclass she represents who applied for unemployment compensation benefits, were determined eligible by the Division, and whose benefits subsequently were suspended pending an evidentiary hearing on the question of their continued eligibility. The court below held that recipients such as Mrs. Burney in continued claim status were within the purview of *California Department of Human Resources De-*

velopment v. Java, supra, and it enjoined the termination of their benefits without a prior evidentiary hearing.[1]

Mrs. Burney and her class are wage earners who involuntarily lost their last jobs and have not yet secured new employment.[2] Prior to their loss of employment, they earned sufficient wages in employment covered by the Indiana unemployment compensation program to qualify for the receipt of unemployment benefits. They filed unemployment compensation claims and, after a lengthy investigation by the Division,[3] were determined eligible for a set amount of benefits payable over a fixed number of weeks.[4] They were scheduled for periodic interviews by a Division official, usually at five or ten week intervals, and thereafter began to receive benefit checks each week.

Sometime following the initial determination of eligibility, their benefits were suspended by a Division official for allegedly no longer meeting continued eligibility requirements. Disputing their suspensions, they requested an

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1. As used in this Brief, the terms "evidentiary hearing" and "due process hearing" refer to a hearing procedure that affords timely and adequate prior notice, the right to appear personally and through counsel, an opportunity to present evidence and to confront and cross-examine adverse witnesses, and a decision by an impartial decision-maker based solely on the evidence adduced at the hearing. This is not a judicial-type hearing (Division Brief [hereinafter "Div. Br."] at 18), but instead an "evidentiary hearing" as that term was used by this Court in Goldberg v. Kelly, 397 U.S. 254, 260, 267-71 (1970).

2. *See* IND. ANN. STAT. §§ 52-1538a-b, 52-1539 (Burns 1964 Repl., 1972 Supp.).

3. The Indiana procedure for determining *initial* eligibility is identical to the California procedure described in detail in California Department of Human Resources Development v. Java, 402 U.S. 121, 125-28 (1971). *See* INDIANA EMPLOYMENT SECURITY DIVISION, UNEMPLOYMENT COMPENSATION CLAIMS MANUAL [hereinafter "MANUAL"] § 13000 et seq.

4. *See* IND. ANN. STAT. § 52-1542a(a) (Burns 1964 Repl., 1972 Supp.); MANUAL § 13100.

evidentiary hearing before a Division Appeals Referee. IND. ANN. STAT. § 52-1542a(e) (Burns 1964 Repl., 1972 Supp.). Several months later[5] a Referee hearing was held at which time they were afforded prior notice, the right to appear personally and through counsel, an opportunity to present evidence and confront and cross-examine adverse witnesses, and a written decision by an impartial decision-maker based solely on the evidence adduced at the hearing. On the basis of the evidence at this hearing, nearly half of the recipients who appealed their suspensions were found to have been fully eligible.[6] Their improperly withheld benefits were then paid to them retroactively in a lump sum.

Plaintiff Burney, for example, lost her job in late December, 1970. On January 7, 1971, she was initially found eligible for a total of eight hundred and seventy-five dollars in unemployment benefits payable over a period of twenty-two weeks at the rate of $40.00 per week. Following a periodic five-week interview, her benefits were summarily suspended for an indefinite period beginning with the week ending March 27, 1971. The Division gave the following reasons for her suspension:

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5. In the calendar year 1971, over 72% of claimant appeals were still undecided after 75 days. U.S. DEPT. OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 17a at 12 (March, 1972). From January-March, 1972, over 63% of claimant appeals were undecided after 75 days. U.S. DEPT. OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 17 at 9 (May, 1972).

6. In the calendar year 1971, 45.9% of the termination decisions appealed by recipients were reversed by Referees. U.S. DEPT. OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 18a at 14 (March, 1972). The most recent statistics filed by the Division with the U.S. Department of Labor reveal that the reversal rate has jumped to 49.2% in the first quarter of 1972. U.S. DEPT. OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 18 at 10 (May, 1972).

> Because the claimant is limiting and restricting the hours for which she is available for work, she is being held as not available for work as of week ending 3-27-71 and until such time as she enters the labor market and becomes available for all shifts of work.

Appendix at 32.

The Division's action was based on Mrs. Burney's alleged refusal of a job offer at the Melting Pot Restaurant in Fort Wayne, Indiana. The Division admits that Mrs. Burney was not afforded a due process hearing prior to the termination of her benefits. (Defendants' Response To Request For Admissions, No. 16 at 4).

On April 2, 1971, Mrs. Burney appealed her suspension and requested an evidentiary hearing before a Division Referee. She contended that she was not obligated to accept the job at the Melting Pot Restaurant because she would have been required to work on the 5 p.m. to 2 a.m. shift; she did not have a car and public buses stopped running at midnight; she had never worked a night shift; she could not find a babysitter for her minor children for such late hours; and she was making an independent effort to secure work on a day shift or earlier night shift.[7]

Faced with the total loss of unemployment compensation during the months pending the decision on her appeal, Mrs. Burney filed a motion to intervene in this action on April 27, 1971. She contended that the Division's practice of suspending unemployment benefits without a prior evidentiary hearing violated her rights and those of her class under the "when due" and "fair hearing" requirements of the Social Security Act, 42 U.S.C. § 503(a), and the due process clause of the Fourteenth Amendment.

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7. *See* In the Matter of Burney, Ind. Employment Security Div. Review Board, Case No. 71-R-297 (Dec. 6, 1971).

On May 7, 1971, the court below granted Mrs. Burney's motion to intervene and issued a temporary restraining order reinstating her benefits. The court found:

> . . . the continued withholding and termination of unemployment compensation insurance benefits will deprive the intervening plaintiff of the source of income necessary to meet her food, clothing and shelter needs.

On July 1, 1971, an evidentiary hearing was held before a Division Referee on Mrs. Burney's appeal. A decision affirming her suspension was issued on July 13, 1971, some 102 days after she originally filed her request for a hearing. She subsequently appealed to the Division Review Board, and, on December 6, 1971, the Board reversed the Referee, holding that the evidence at the Referee hearing showed that her benefits had been erroneously suspended. The Board found that she neither had been unavailable for work nor had turned down a suitable work offer.

On October 27, 1971, the three-judge district court held that the suspension of unemployment benefits without a prior evidentiary hearing violated the provision of the **Social Security Act requiring that unemployment compensation be paid "when due". Pursuant to the lower court's order, unemployment compensation recipients in Indiana are presently being afforded the opportunity for an evidentiary hearing prior to the suspension of their benefits.**[8]

---

8. The Division's suggestion that the order of the court below requires a full evidentiary hearing for every continued claim recipient every week (Div. Br. at 19) is absurd. Under the procedure now in effect in Indiana pursuant to the lower court's order, an evidentiary hearing is required and is given only to recipients whom the Division seeks to terminate and who request such a hearing. *See* Claims Manual Transmittal Letter No. 430 implementing lower court order. Naturally, the Division need not provide an evidentiary hearing to those recipients whose continued eligibility is not in question. *Id.*

It is well to clarify at the outset the limited scope of the questions presented herein. Despite the Division's assertions to the contrary (Div. Br. at 13), this case, as the court below pointed out,[9] raises no issue concerning the procedural safeguards to be afforded persons whose initial claims for unemployment benefits have been rejected. The unemployed workers whose rights are here at issue have been investigated by the Division[10] and ruled eligible for unemployment benefits for a fixed number of weeks. They have been specifically placed by the Division in a "continued claim" category. *See* MANUAL §§ 13620, 13720-32. This factual situation is markedly different from that of a claimant whose entitlement to benefits has never been officially established.

SUMMARY OF ARGUMENT

I

In enacting the Social Security Act, Congress intended unemployment compensation to serve three distinct purposes: (1) to enable workers to survive temporary periods of unemployment without having to resort to relief, (2) to help workers find reemployment and (3) to maintain the purchasing power of the unemployed, thus stabilizing consumer demand. To achieve these objectives, state unemployment compensation procedures must be designed to provide "early substitute compensation during unemployment." *California Department of Human Resources Development v. Java*, 402 U.S. 121, 133 (1971). In order to assure that benefits are paid in a timely fashion, the Act provides that State unemployment procedures "be reasonably calculated to insure full payment of unemployment

9. *See* Jurisdictional Statement [hereinafter "J.S."] at A-10. The lower court's opinion is reproduced at J.S. pages A-1—A-11.

10. *See* California Department of Human Resources Development v. Java, 402 U.S. 121, 125-28 (1971).

compensation when due." 42 U.S.C. 503(a) (1). For benefits to be paid "when due", they must not only commence promptly once an unemployed worker is determined initially eligible for a fixed number of weeks, *see Java, supra,* but also must be paid regularly throughout his fixed period of eligibility until such time as he has been properly found to be no longer eligible for them. Only a procedure that provides an opportunity for an evidentiary hearing *before* benefits are suspended insures *eligible* unemployed workers the continuous payment of unemployment compensation "when due."

Although a recipient has been found initially eligible for unemployment compensation for a fixed number of weeks, his benefits may be abruptly suspended on the basis of an informal interview. He then receives no benefits for many months pending an evidentiary hearing before a Referee. If the Referee finds that the suspension was erroneous—as occurs in virtually one half of all cases—the eligible unemployed worker receives his benefits retroactively in a lump sum. Since the average length of time an unemployed worker is entitled to receive compensation is 11 weeks, a recipient whose payments have been wrongfully suspended in a summary manner usually receives no benefits until a time in which he is no longer qualified for unemployment compensation. In the interim, he is forced somehow to survive without the use of "sustaining funds." *Nash v. Florida Industrial Commission,* 389 U.S. 235, 239 (1967).

By assuring that a large number of eligible employees do not receive benefits until long after the "short-term" period in which the Division concedes unemployment compensation must be paid (Div. Br. at 14), the Indiana summary suspension procedure undermines all three objectives of the federal statute. The court below properly held, therefore, that the Indiana procedure was not "reasonably calculated to provide full payment of unemployment compensation when due." 42 U.S.C. 503(a) (1).

The Social Security Act further requires that the Division afford a "fair hearing" to unemployed workers whose benefits it seeks to suspend. 42 U.S.C. 503(a) (3). To accomplish the purposes of the unemployment compensation program, this hearing must be held before benefits are suspended. Only a prior "fair hearing" insures the regular flow of benefits to eligible workers—which "is what the unemployment insurance program was all about." *Java, supra,* 402 U.S. at 135.

II

The principal objective of the Fourteenth Amendment's requirement of procedural due process is to prevent the erroneous deprivation of property rights. The shocking rate at which the Division's summary suspension procedure improperly deprives *eligible* recipients of vitally needed unemployment benefits provides a classic illustration of why this Court has repeatedly held that notice and a prior evidentiary hearing are the usual requisites of procedural due process. Unemployment compensation terminations present an even more compelling case for a prior evidentiary hearing than did the welfare terminations at issue in *Goldberg v. Kelly,* 397 U.S. 254 (1970).

Like welfare, unemployment compensation provides "subsistence" benefits, furnishing cash to an unemployed worker "at a time when otherwise he would have nothing to spend." *California Department of Human Resources Development v. Java,* 402 U.S. 121, 132 (1971). While providing greater dignity and security than public assistance, the unemployment compensation program was specifically designed by Congress to afford the same protection for the "working poor" that welfare provides for its beneficiaries. Empirical data confirms that in the absence of unemployment benefits the unemployed worker is without sufficient

assets to tide himself over a period of unemployment. Except in an extremely unusual case, he is categorically ineligible for welfare assistance. Since, by definition, he is involuntarily unemployed, the eligible recipient has no ready alternative source of "sustaining funds." *Nash v. Florida Industrial Commission, supra.* Thus, as in *Goldberg,* the "crucial factor" of need pervades this case.

Even more than in the case of welfare, however, the complex factual issues presented in unemployment compensation termination cases make a prior evidentiary hearing essential to an accurate decision. Unemployment cases involve the application of diverse statutory requirements to a plethora of factual situations. Third party information often plays a decisive role. Under these circumstances, such due process elements as timely and adequate notice detailing the reasons for a proposed termination, the right to appear personally and through counsel, an opportunity to present evidence and confront and cross-examine adverse witnesses, and a written decision by an impartial decision-maker are particularly necessary to protect unemployed workers from the wrongful deprivation of benefits.

No overriding state interest necessitates the use of a summary procedure to terminate unemployment compensation. Potential losses to the Employment Security Fund as a result of providing prior evidentiary hearings are *de minimis.* Unlike welfare, the state has ample powers to recoup unemployment overpayments. Since the implementation of the lower court's order, the intergration of a prior evidentiary hearing into the Division's termination procedure has proved to be efficient and workable.

Nothing in the nature of unemployment compensation renders the *Goldberg* rationale inapplicable to the present case. Both welfare and unemployment recipients occupy an identical eligibility status. Following an initial determina-

tion of eligibility, recipients in both programs must report regularly and perform certain affirmative duties to maintain their continued eligibility. For example, both programs require that continued recipients seek work and accept offers of employment.

Nor are the interests of employers adversely affected by providing recipients an evidentiary hearing prior to terminating benefits. If at the evidentiary hearing or at any subsequent stage it is determined that a recipient is no longer eligible for benefits, his former employer is relieved of all liability for any benefits paid to the recipient in the interim.

This Court's decision in *California Department of Human Resources Development v. Java, supra,* that unemployment benefits may not be summarily suspended pending an employer's appeal in no way renders *Goldberg* inapposite. In *Java,* the Court dealt with procedures for establishing *initial* unemployment eligibility. Entirely different standards apply when the state seeks to divest a recipient of a statutory entitlement that he previously has been enjoying.

Unemployment compensation is a worker's earned "contractual right" to benefits which his labor helped to create. *Java, supra,* 402 U.S. at 131. He relies on its availability should he become involuntarily unemployed. Due process does not permit its termination without a prior evidentiary hearing.

ARGUMENT

I

THE SUMMARY SUSPENSION OF UNEMPLOYMENT COMPENSATION BENEFITS FOR SEVERAL MONTHS PENDING AN EVIDENTIARY HEARING VIOLATES THE "WHEN DUE" AND "FAIR HEARING" REQUIREMENTS OF THE SOCIAL SECURITY ACT.

This Court, like the court below, can decide this case without reaching the constitutional question of whether

the Fourteenth Amendment requires an evidentiary hearing prior to the suspension of unemployment compensation benefits. *Compare California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971). Indeed, a finding that such a hearing is required by statute would be in line with this Court's practice of liberally construing statutory requirements in order that delicate constitutional issues of procedural due process need not be reached. *See Greene v. McElroy*, 360 U.S. 474, 507-08 (1959); *Wong Yang Sun v. McGrath*, 339 U.S. 33, 48-51 (1949).

Section 303(a) of the Social Security Act, 42 U.S.C. § 503(a) provides:

> The Secretary of Labor shall make no certification for payment [of federal funds for administration of state unemployment compensation statutes] to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provisions for—
>
> (1) such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; . . .
>
> (3) opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied.

An examination of the statutory purposes of the unemployment compensation program, as revealed both in the legislative history and judicial interpretation of the Social Security Act, compels the conclusion that, under the "when due" and "fair hearing" requirements, recipients must be provided with a full opportunity to be heard before the

suspension of their benefits.[11] In enacting the unemployment compensation program, Congress sought to achieve three principal purposes: (1) providing sustenance and security to unemployed workers without relegating them to public assistance; (2) helping unemployed workers to find employment substantially equivalent to their former jobs; and (3) maintaining the purchasing power of the unemployed, thereby stabilizing consumer demand and sustaining the economy. *See generally California Department of Human Resources Development v. Java,* 402 U.S. 121, 130-33 (1971). To achieve these purposes, Congress must have intended a hearing procedure that insures that payments are made to workers at a time in their unemployment cycle when such goals would be facilitated rather than frustrated. For this end to be accomplished, payments must not only commence promptly when a worker is unemployed, *see Java, supra,* they must also continue throughout the period of unemployment until such time as he is properly found to be no longer eligible for them. Only a "fair hearing" held before benefits are suspended can assure eligible unemployed workers full payment of unemployment compensation "when due". 42 U.S.C. § 503(a).

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11. It is clear that this Court has power to review the issue of whether the Division's procedures comply with the Social Security Act, regardless of administrative approval of those procedures by the Secretary of Labor. *See* California Department of Human Resources Development v. Java, 402 U.S. 121 (1971); Rosado v. Wyman, 397 U.S. 397, 420-23 (1970); King v. Smith, 392 U.S. 309 (1968). In Java, *supra,* the Secretary had not only approved the challenged procedure but also submitted a brief amicus curiae arguing that it conformed to the provisions of the Act. This Court, citing Rosado v. Wyman, 397 U.S. 397, 420-21 (1970), nonetheless reviewed the issue independently and held that the California procedure violated the Act. Java *supra,* 402 U.S. at 135. It rejected the argument advanced by California that the administrative approval of the procedure by the Secretary of Labor precluded judicial review. *See* California Department of Human Resources Development v. Java, *supra,* Brief of Appellants at 10.

A

BY SUSPENDING UNEMPLOYMENT BENEFITS FOR SEVERAL MONTHS WITHOUT A PRIOR EVIDENTIARY HEARING ON CONTINUED ELIGIBILITY, THE DIVISION DEFEATS THE OBJECTIVES OF THE SOCIAL SECURITY ACT AND VIOLATES THE "WHEN DUE" REQUIREMENT.

1. By Causing Substantial and Unnecessary Delay in the Payment of Benefits to Eligible Recipients, the Division's Summary Suspension Procedure Fails to Insure the Full Payment of Unemployment Compensation "When Due".

Section 303(a)(1) of the Social Security Act provides that state unemployment compensation programs must "be reasonably calculated to insure full payment of unemployment compensation when due". 42 U.S.C. § 503(a)(1). In *California Department of Human Resources Development v. Java*, 402 U.S. 121, 133 (1971), the Court found that under this provision of the Act, unemployment benefits become "due" after the initial eligibility determination—"the critical point in the [unemployment compensation] procedure." 402 U.S. at 127. Based upon this finding, the Court held unlawful the summary suspension of an unemployed worker's benefits pending an employer's appeal. Since the summary suspension of benefits frustrated the Congressional objective of providing "early substitute compensation during unemployment," the Court held that it violated the Social Security Act's "when due" requirement. 402 U.S. at 133.

The continued claim recipients in this case, like the recipients in *Java*, have been found initially eligible for benefits for a fixed number of weeks, yet they receive no benefits pending an evidentiary hearing on their continued eligibility. Indeed, the delay pending the hearing is so long that the great majority of eligible suspended recipients are already back at work by the time they received their benefits. In 1971, the average length of time an unemployed worker in Indiana received unemployment benefits was eleven weeks. *See* THIRTY-SIXTH ANNUAL REPORT OF THE

INDIANA EMPLOYMENT SECURITY BOARD, EMPLOYMENT SECURITY IN INDIANA 1971 at 55 (March 30, 1972) [hereinafter "ANNUAL REPORT"]. Since 72% of appealed suspensions were not decided within an eleven week period (75 days),[12] the overwhelming proportion of unemployed workers whose benefits were wrongfully suspended eventually received them at a time when they no longer qualified for *current* payments. Thus, in the event his benefits are summarily suspended, an *eligible*[13] worker may receive no weekly benefits when he is unemployed and in desperate need of income,[14] only to receive a lump sum payment many months later when he is already back at work.

Faced with an identical summary suspension procedure but a much shorter period of delay pending the Referee decision, a three-judge district court in *Wheeler v. Vermont*, 335 F. Supp. 856 (D.Vt., 1971), reached the same conclusion as the court below and held that the procedure violates the Social Security Act. As Judge Oakes stated:

> We thus face the question whether this procedure falls without the federal statutory mandate of § 303(a)(1) of the Social Security Act, 42 U.S.C. § 503(a)(1), that the state method of administration be "reasonably calculated to insure full payment of unemployment compensation when due." *See California Department of Human Resources v. Java, supra; cf. Rosado v. Wyman*, 397 U.S. 397, 420-21 (1970), *aff'd after remand*, 402 U.S. 991 (1971); *King v. Smith, supra* at 317, 333. The evidence here shows that on the average it takes approximately 37.5 days from a time a claimant appeals from a Claim Examiner's determination until the Appeal Referee's decision is rendered. This delay

12. *See* note 5, *supra*.

13. Almost 50% of the unemployed workers who appeal the suspension of their benefits are found to be eligible at the Referee hearing, *see* note 6, *supra*.

14. *See* Section II-A-1 of this Brief, *infra*.

> alone would be enough to warrant a finding that the procedure as we have above described it is not "reasonably calculated" to produce full payment "when due".

335 F. Supp. at 861.

The Division concedes that "unemployment compensation is basically a short-term program to aid persons off work only for the period of time it takes them to find work." Div. Br. at 14. *See also Java, supra,* 402 U.S. at 130-33. However, as shown above, the Division's own statistics reveal that the Indiana scheme does not result in paying benefits during the "limited period" between jobs as Congress intended, but rather results in payment several months after unemployment has ended. *See* H. R. REP. No. 615, 74th Cong., 1st Sess. [hereinafter "H. R. REP."] at 7 (1935); *Report To The President Of The Committee On Economic Security, Hearings on S. 1130 Before The Sen. Comm. On Finance,* 74th Cong., 1st Sess. at 1321-22 (1935).[15] Since the suspension of benefits pending an evidentiary hearing systematically denies "early substitute compensation during unemployment"[16] to eligible unemployed workers, it frustrates the fundamental objectives of the Social Security Act and, as the court below found, is not "reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1).

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15. As a California legislative study pointed out:

> It has always been conceded that the purpose of an unemployment insurance program is to provide benefits when unemployed and not four or five weeks thereafter.

REPORT OF THE SENATE INTERIM COMMITTEE ON UNEMPLOYMENT INSURANCE TO THE FIFTY-SIXTH CALIFORNIA LEGISLATURE 62 (1945).

16. *See* California Department of Human Resources Development v. Java, 402 U.S. 121, 133 (1971).

2. The Division's Summary Suspension Procedure Frustrates the Congressional Purposes of the Unemployment Compensation Program.

a. *The summary suspension of benefits forces eligible recipients to rely on welfare for sustaining funds.* The chief purpose of the unemployment compensation program was to "provide cash to a newly unemployed worker at a time when otherwise he would have nothing to spend, serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." *Java, supra,* 402 U.S. at 131-32; *see generally,* H. R. REP. at 7; S. REP. No. 628, 74th Cong., 1st Sess. 12 (1935). Thoroughly familiar with the plight of workers "thrown out of work suddenly,"[17] Congress sought to alleviate the pressing need for "security during the period following unemployment." S. REP. No. 628, *supra.* However, because of the stigma attached to welfare, it was believed to be an inappropriate means of sustaining workers during temporary periods of unemployment. As was brought out on the House floor by the Chairman of the Ways and Means Committee:

> The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of the population and its loss of self-respect. The protection afforded by social insurance comes to the worker as a matter of right. It is contingent upon the previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief.

79 CONG. REC. 5468 (1935) (remarks of Representative Doughton).

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17. *See Hearings on H.R. 4120 Before the House Comm. on Ways and Means,* 74th Cong., 1st Sess. 214 (1935) (statement of Harry L. Hopkins).

Congress not only viewed welfare as imposing a stigma on unemployed workers, it doubted that welfare, with its reliance upon general tax revenues which fluctuate with the state of the economy, could adequately provide large numbers of workers with sustenance during a period of economic downturn. *See Steward Machine Co. v. Davis*, 301 U.S. 548, 586-87 (1937); Note, *Charity versus Social Insurance in Unemployment Compensation Laws*, 73 YALE L. J. 357, 359 (1963). In order to reduce the burden on local welfare rolls during periods of economic crisis and "very materially reduce the cost of relief in future years,"[18] the Employment Security Fund was designed to accumulate reserves[19] in times of economic prosperity. *See* H. R. REP. at 7.[20]

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18. S.REP. No. 628, 74th Cong., 1st Sess. at 12. *See also* Java v. California Department of Human Resources Development, 317 F.Supp. 875, 879 (N.D. Cal. 1970), *aff'd.* 402 U.S. 121 (1971), in which the court stated: "The most fundamental purpose of both the Federal and the State unemployment compensation laws is 'to *prevent* the burden of injured employees becoming charges upon society.' " [citations omitted].

19. The Indiana Employment Security Fund contained a *surplus* of $310,220,000.00 on January 1, 1972. ANNUAL REPORT at 27.

20. Recent events have substantiated Congress' belief that state welfare systems cannot adequately deal with the economic dislocations caused by a severe period of unemployment. For example, in enacting emergency welfare legislation in 1971 to relieve the drain on welfare funds caused by unemployment, the California Legislature declared:

> The Legislature hereby finds that the high rate of unemployment, which has been aggravated in California's most populous regions by layoffs in the aerospace industries, has led to a high level of public assistance grants . . . . The Legislature further notes that increasing state taxes will have a depressing effect upon those individuals, firms, and industries now operating at a marginal level and will tend to further aggravate the unemployment rate and increase the welfare rolls . . . . The Legislature finds, therefore, that the most compelling state interest requires that the relationship between welfare and unemployment be recognized.

Welfare Reform Act of 1971, § 24.65, CAL. WELF. & INST. CODE § 11252.5 (West Supp. 1972).

In order for unemployment compensation to provide workers "security during the period following unemployment," *Java, supra,* 402 U.S. at 132, and thereby "to replace [relief] in large part," H. R. REP. at 7, benefit payments must continue throughout the period for which the unemployed worker has been found eligible. Interrupting the payment of benefits for several months pending an evidentiary hearing forces a large number of unemployed workers to turn to relief, or leaves them with no income whatsoever. Thus, by suspending a recipient's benefits before the evidentiary hearing on his continued eligibility, the Division undermines the Congressional purpose of "maintain[ing] the recipient at subsistence levels without the necessity of his turning to welfare or private charity," *Java, supra,* 402 U.S. at 131-32, thereby increasing the burden on the already overburdened state and local taxpayer.

b. *The summary suspension of benefits renders eligible workers less able to find substantially equivalent employment.* Unemployment compensation was established by Congress "as a means of assisting a worker to find substantially equivalent employment." *Java, supra,* 402 U.S. at 132. In explaining to the House Ways and Means Committee why the draftsmen of the Social Security Act chose to include an unemployment compensation program, a member of the President's Committee on Economic Security pointed out:

> This [the Act] covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job. We felt that in that period of 2½ to 3 months the beneficiaries should get an insurance benefit in cash.

Hearings on H.R. 4120 Before the House Comm. on Ways and Means, 74th Cong., 1st Sess. 214 (1935) (statement by

Harry L. Hopkins, Federal Emergency Relief Administrator).

If manpower is able to flow from pockets of unemployment to areas where jobs are available, employment becomes more stabilized and the supply and demand mechanism in the labor market operates more efficiently. But the ability of a worker to find substantially equivalent employment is severely undercut when funds which may be used to purchase transportation for job interviews are terminated for several months during the period in which he is unemployed. The funds that might have been used to increase labor mobility may instead have to be spent on basic necessities. *Cf. Goldberg v. Kelly,* 397 U.S. 254, 264 (1970). Thus, to the extent that payments are delayed, the opportunity to find employment is diminished, which in turn often lengthens the period in which a recipient must rely on unemployment benefits for support. By suspending benefits pending an evidentiary hearing, only to pay them in a lump sum many months later, the Division is often responsible for a greater withdrawal from the Employment Security Fund than if payments were made in their regular course during the initial stages of unemployment.

c. *The summary suspension of benefits reduces the purchasing power of the unemployed.* Both the national economy and the unemployed worker benefit when purchasing power is maintained throughout periods of high unemployment. Congress viewed unemployment compensation as "a measure intending to maintain purchasing power, upon which business and industry are dependent." H.R. Rep. at 7; *see generally Java, supra,* 402 U.S. at 132-33. During the period in which they receive no compensation, unemployed workers are to a great extent inhibited from spending money on consumer goods. Declining consumption leads to a decrease in production by business firms, which

in turn causes further unemployment, and eventually, economic depression. On the other hand, maintenance of purchasing power, through a steady flow of unemployment benefits commencing soon after unemployment occurs, contributes to the stability of the overall economic situation. As Senator Wagner, sponsor of the Social Security Act, pointed out to the Senate Committee on Finance:

> The chief merit of unemployment insurance, however, is that it will exert a profound influence upon the stabilization of industry.... The transfer of purchasing power by benefit payments when danger threatens will float the business ship off the shoals of depression to the security of prosperity.

Hearings on S. 1130 Before the Sen. Comm. on Finance, 74th Cong., 1st Sess. 2 (1935).[21]

Thirty-five years later, in reporting the Federal-State Extended Unemployment Compensation Act of 1970 (Public Law 91-373), the Senate Committee on Finance reiterated the vital role of unemployment benefits in maintaining economic stability:

> In periods of economic recession, when substantial numbers of workers in a State or in the Nation experience unemployment which extends beyond the periods for which they are protected under current State Laws,

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21. Similarly, Frances Perkins, Secretary of Labor and Chairman of the President's Committee on Economic Security, which drafted the Social Security Act, testified:

> We have also by observation of the condition of other countries having a modest scheme of unemployment insurance, come to a recognition that the small merchants of a locality, and those who provide them with their stock, have derived a benefit because persons out of work continued to buy the necessities of life and therefore helped to make a market for the whole community. That, of course, in its own turn, has a very definite and advantageous effect upon employment in other lines than in that first depressed.

Hearings on S.1130 Before the Sen. Comm. on Finance, 74th Cong., 1st Sess. 111 (1935).

> the resulting uncompensated unemployment may have a serious impact not only upon the workers and their families, but on the purchasing power and economic health of the entire Nation.

S. Rep. No. 91-752, 91st Cong., 2nd Sess. (1970), *U.S. Code Cong. and Admin. News* at 3635.

For the maintenance of purchasing power to be achieved, it is necessary that unemployment benefits be paid throughout the critical period of unemployment, not in lump sum form, long after unemployment has ceased as is frequently the result under the Division's summary suspension procedure. Payments must *regularly* be made "early in the downturn, immediately after unemployment makes its appearance." *See* Clague, *The Economics of Unemployment Compensation,* 55 Yale L.J. 53, 69 (1945). Uninterrupted payments enable workers and their families:

> to preserve existing assets, such as homes, furniture, and automobiles, thus avoiding the forced liquidation of assets which aggravates the downturn in business. They encourage more confident spending of other resources, thus helping to avoid a "freezing" of purchasing power on the part of millions of workers when they are faced with unemployment.

Clague, *supra,* 55 Yale L.J. at 69.[22] Whereas lump sum payments may be spent erratically, a steady weekly income assures that "these funds are ordinarily spent for the basic necessities of life and furnish purchasing power for the products of our basic industries such as agriculture, food, and clothing." *Id.* By interrupting the steady stream of benefit payments to unemployed workers for several months pending an evidentiary hearing, the Division's summary

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22. Unemployment compensation is "specially earmarked for the use of the unemployed at the very times when it is best for business that [it] should be so used." Statement of Senator Robert F. Wagner, *Hearings on S. 1130 Before the Sen. Comm. on Finance,* 74th Cong., 1st Sess., 2 (1935).

suspension procedure thus frustrates the Social Security Act's objectives of stabilizing the economy by maintaining the purchasing power of the unemployed. *Cf. Java, supra,* 402 U.S. at 132-33.

3. The Continued Claim Recipient Is Entitled To The Protection Of The "When Due" Clause.

Disregarding the fact that the summary suspension of benefits for several months directly contravenes the purposes of the Social Security Act, the Division attempts to justify the interruption of benefit payments by arguing that each week constitutes a "new" eligibility determination and that benefits are therefore only "due" for a one-week period. (Div. Br. at 7-9, 11-12). Both the Division's terminology and its practices belie this contention. After the initial eligibility investigation, *see Java, supra,* 402 U.S. at 125-28, the worker who has been found initially eligible is placed by the Division in a "continued claims" category. MANUAL §§ 13720-32. He has established his benefit rights as an "insured worker," IND. ANN. STAT. § 52-1526x (Burns 1964 Repl.); IND. ANN. STAT. § 52-1538d (Burns 1964 Repl. 1972 Supp.), and any disputes concerning the reasons for the termination of his last employment or the extent of his prior earnings have been resolved in his favor. *See Java, supra,* 402 U.S. at 125-29. He has been found eligible to receive a set amount of benefits for a fixed number of weeks. MANUAL § 13100. In short, following an initial determination of eligibility, the unemployed worker occupies a new position, entirely different from a worker whose entitlement to benefits has never been officially established.

Thereafter, although it is necessary for the recipient to "report to the local office to continue his claim," MANUAL § 13121, no new initial eligibility determination occurs. The recipient merely goes to the Division each week, executes a benefit voucher, and then is mailed his check. MANUAL

§ 13620.[23] Personal interviews occur not every week, but only at *five* or *ten* week intervals, depending on the recipient's category.[24] If his continued eligibility is challenged by the Division, it is unlikely that benefits will be withheld only for a particular week. Rather, depending upon the Division's

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23. Despite California's contention that unemployment recipients in Indiana and California undergo a *new* eligibility determination "each week" (California Amicus Brief [hereinafter "Cal. Br."] at 1-2, 7), their procedures show otherwise. In California, once a recipient has been found initially eligible for benefits, he need only report to the Department every two weeks to execute his computerized payment voucher and receive his check. *See* California Department of Human Resources Development, "Continued Claim Statement," DE 4581, Rev. 25 (Jan. 1972).

24. Section 13720 of the MANUAL provides that continued claim recipients be placed in one of three categories:

> *Group A*: Those claimants who have shown [in their initial eligibility investigation] a firm attachment to the labor market;
>
> *Group B*: Those claimants [who] . . . need further clarification or who . . . are classified temporarily until placed in the A or C groups;
>
> *Group C*: Those claimants who do not show a firm attachment to the labor market and who present problems of reemployment.

Unemployed workers placed in Group A are defined as:

> Those claimants [who] . . . have had employment with one employer or have been in a regular occupation for a long enough period of time to indicate that they want to obtain suitable work as soon as it can be found.

MANUAL § 13723. Group A workers are interviewed only once every *ten* weeks in a "special interview" whose purpose "is to determine whether or not the claimant shall continue in Group A." MANUAL § 13725.

Group C workers are defined as "Those claimants [for whom] . . . there are likely to be continuing questions of ability to work or availability . . . ." Even Group C workers (those who are deemed likely to present questions concerning the maintenance of their continued eligibility) ordinarily are informally interviewed only once every *five* weeks. MANUAL § 13727.

In addition to reporting for interviews every five or ten weeks, the recipient must come into the Employment Security office each week to fill out a voucher for his weekly check. In signing the voucher, he certifies whether he "work[ed] anywhere last week [and] if so, what were [his] earnings?" and whether he "refuse[d] an offer of work?" The MANUAL points out that in "accepting the voucher" it is unnecessary [for the clerk] to question the claimant in detail . . . with respect to each certification." MANUAL § 13620.

purported justification for the suspension, his benefits may be discontinued for what the Division terms a "penalty" period of several weeks, and often permanently. Div. Br. at 8.[25] In Mrs. Burney's case, for example, the erroneous termination of benefits was for an indefinite period.

As the court below properly found, therefore, benefits are not "due" each week, but rather are continuously "due" continued claim recipients throughout their fixed period of eligibility, unless they have been found on the basis of a full evidentiary hearing to have violated Division regulations:

> ... the court finds that the concept of when benefits are due under the Social Security Act does not change from week to week after a claimant has been found eligible and no prior, due process hearing has been held with regard to a subsequent finding of eligibility .... The court thus finds that plaintiff Burney's benefits were "due" and could not be summarily suspended due to a deputy's determination of ineligibility under § 2-1542a(d). Having been found eligible pursuant to the [initial eligibility determination procedure], plaintiff Burney was entitled to benefits until defendants afforded her a hearing. To conclude otherwise would frustrate the purpose of early substitute compensation during unemployment under § 303(a)(1) of the Social Security Act. *See Java, supra*, 402 U.S. at 133-35.

J.S. at A-9—10.

To accomplish the objectives of the Social Security Act, Congress intended that continued claim recipients, no less

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25. *See* IND. ANN. STAT. § 52-1540 (Burns 1964 Repl.) (permanent termination for alleged misstatement); IND. ANN. STAT. § 52-1538b (Burns 1964 Repl., 1972 Supp.) (indefinite suspension for alleged continuing unavailability for work); IND. ANN. STAT. § 52-1539a (Burns 1964 Repl., 1972 Supp.) (suspension for alleged refusal of suitable work; (a) for benefit periods established before July 3, 1971—until claimant earns not less than ten times his weekly benefit amount, plus a 25% reduction in benefits; (b) for benefit periods established subsequent to July 3, 1971—for five consecutive calendar weeks or until claimant earns at least six times his weekly benefit amount, plus a 25% reduction in benefits).

than the initial recipients before the Court in *Java*, be afforded timely payment of unemployment compensation. Only an evidentiary hearing prior to the termination of benefits can achieve this goal, and insure eligible recipients "full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1).

B

BY DELAYING AN EVIDENTIARY HEARING UNTIL SEVERAL MONTHS AFTER THE SUSPENSION OF BENEFITS, THE DIVISION VIOLATES THE "FAIR HEARING" REQUIREMENT OF THE SOCIAL SECURITY ACT.

The Social Security Act requires that the Division afford a "fair hearing" to unemployment compensation recipients whose benefits it seeks to suspend. 42 U.S.C. § 503(a) (3). This statutory "fair hearing" must comport with due process requirements. As this Court stated in *Shields v. Utah-Idaho Central Ry. Co.*, 305 U.S. 177, 182 (1938), the "manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist."[26]

It is uncontested that the "fair hearing" required by the Social Security Act must be a full evidentiary hearing.[27] It must also be a prior hearing. In interpreting other statutory "fair hearing" requirements, this Court has recognized

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26. *See also* Philadelphia Co. v. Securities and Exchange Commission, 175 F.2d 808, 817 (D.C.Cir. 1948), *vacated as moot* 337 U.S. 901 (1949).

27. Div.Br. at 16. In describing the elements that should be included in an unemployment compensation "fair hearing," the United States Department of Labor has specified the same procedural protections outlined by this Court in Goldberg v. Kelly, 397 U.S. 254 (1970):

> Hearings must be fair, and they must therefore be conducted in accordance with procedural safeguards. The essential requisites of fairness, although expressed in many ways, include the following elements which have been excerpted from case law: "timely notice to all claimants of every material step in the proceedings; . . . to hear the evidence

that in many instances a statute only satisfies due process if the hearing is provided *prior* to the deprivation of property. In *United States v. Illinois Central Railroad Company*, 291 U.S. 457 (1934), for example, an administrative procedure lacking a prior hearing was challenged on both statutory and constitutional grounds. The Court found that a prior hearing was required under the statute's fair hearing provision.[28] Having so ruled, the Court concluded that the statute satisfied due process requirements. Likewise, for the unemployment compensation statutory scheme to meet constitutional standards,[29] the "fair hearing" required by the Social Security Act must be a prior hearing.

Further, to assure fulfillment of the statutory purposes of the unemployment compensation program, only a hearing held before benefits are suspended meets the Act's "fair hearing" requirement. Only a prior hearing insures the regular flow of benefits to eligible workers—which "is what the unemployment insurance program was all about." *Java, supra*, 402 U.S. at 135. Anything less denies benefits during the critical period in which the Division recognizes unemployment compensation must be paid. (Div.Br. at 14).

The Division urges that the post-termination Referee hearing fulfills its "fair hearing" obligation under the Act. (Div.Br. at 16). However, by delaying this evidentiary hearing until several months after the suspension of a continued claim recipient's benefits, the Division fails to

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against him and to know the claims of his opponent; . . . to cross-examine witnesses; . . . that the Decision of the Board shall be governed by and based upon the evidence produced at the hearing . . . ."

U.S. DEPARTMENT OF LABOR UNEMPLOYMENT INSURANCE SERVICES OFFICE OF STATE OPERATIONS, GUIDE TO UNEMPLOYMENT INSURANCE BENEFITS APPEALS: PRINCIPLES AND PROCEDURES, 2-3 (1970). *See also* IND.ANN.STAT. §§ 52-1542b, 52-1558a (Burns 1964 Repl.); 4 IND. ADM. RULES & REGS. § (52-1542b)-1 Burns 1967).

28. *See also* Greene v. McElroy, 360 U.S. 474 (1959).

29. *See* Section II of this Brief, *infra*.

provide a "fair hearing" at a meaningful stage in the unemployment compensation cycle. Large numbers of eligible recipients are thereby deprived of "early substitute compensation during unemployment." *Java, supra,* 402 U.S. at 133. The Division's failure to provide a pre-termination evidentiary hearing directly contravenes the Congressional purposes of (1) providing sustenance and security to unemployed workers without relegating them to welfare, (2) helping workers in their search for new employment, and (3) maintaining the purchasing power of the unemployed through the continuous payment of benefits, and thus violates the Social Security Act's "fair hearing" requirement. 42 U.S.C. § 503(a)(3).

II

THE TERMINATION OF UNEMPLOYMENT BENEFITS WITHOUT ADEQUATE NOTICE AND A PRIOR EVIDENTIARY HEARING VIOLATES DUE PROCESS.

The framework for considering the requirements of procedural due process[30] was set forth by this Court in *Goldberg v. Kelly,* 397 U.S. 254, 262-63 (1970), a case that dealt with welfare terminations but otherwise is identical to the case *sub judice:*

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30. The identical constitutional issue presented in this case has been passed on by four lower courts. With the exception of one divided three-judge court, these courts have held that a prior evidentiary hearing is required before the termination of unemployment compensation benefits. *See* Wheeler v. Vermont, 335 F.Supp. 856 (D. Vt. 1971) (three-judge court); Crow v. California Department of Human Resources Development, 325 F.Supp. 1314 (N.D. Cal. 1970), *appeal docketed* 9th Cir. No. 71-1045; Java v. California Department of Human Resources Development, 317 F.Supp. 875 (N.D. Cal. 1970) (three-judge court), *aff'd on statutory grounds* 402 U.S. 121 (1971); *Contra* Torres v. New York State Department of Labor, 321 F.Supp. 432 (S.D.N.Y.) (divided three-judge court), *vacated* 402 U.S. 968, *judgment reinstated* 333 F. Supp. 341 (1971), *aff'd. per curiam* 405 U.S. 949 (1972), *petition for rehearing continued for further consideration* 40 U.S.L.W. 3001 (June 30, 1972).

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. [citations omitted].[31]

After weighing the interests of the recipients and the state, this Court held in *Goldberg* and its companion case, *Wheeler v. Montgomery*, 397 U.S. 280 (1970), that procedural due process requires an evidentiary hearing before welfare payments may be discontinued or suspended. This Court further ruled that the pre-termination hearing must contain the fundamental elements of "rudimentary due process," including timely and adequate notice detailing the reasons for a proposed termination, the right to appear personally and through counsel, an opportunity to present evidence and confront and cross-examine adverse witnesses, and the right to a written decision by an impartial decision-maker based solely on the rules and evidence adduced at the hearing. *Goldberg v. Kelly, supra*, 397 U.S. at 267-71.

The principles enunciated in *Goldberg* are supported by a host of recent decisions of this Court, which firmly establish that a state must afford a prior hearing before depriving an individual of a significant property right or statutory entitlement. Interests found to demand such due process safeguards include wages, *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969); reputation, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); marriage dissolution, *Boddie v. Connecticut*, 401 U.S. 371 (1971); driver's licenses,

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31. It is beyond dispute that procedural due process is applicable to the Division's actions in terminating unemployment benefits. As this Court held in Sherbert v. Verner, 374 U.S. 398 (1963) and specifically reaffirmed in Goldberg v. Kelly, 397 U.S. 254, 262 (1970): "Relevant constitutional restraints apply . . . to disqualification for unemployment compensation."

Bell v. Burson, 402 U.S. 535 (1971); custody rights, *Stanley v. Illinois*, 405 U.S. 645 (1972); consumer goods, *Fuentes v. Shevin*, 407 U.S. 67 (1972); and "de facto teacher tenure rights," *Perry v. Sinderman*, ... U.S. ....., 92 S.Ct. 2593 (1972).[32] As this Court recently reaffirmed in *Fuentes v. Shevin, supra*, 407 U.S. at ....., 92 S.Ct. at 1998, *Goldberg* did not "[mark] a radical departure from established principles of procedural due process," but rather was "in the mainstream of past cases . . . establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect."

The language of the *Goldberg* opinion indicates that notice and a prior evidentiary hearing are required before unemployment benefits may be terminated. In holding that welfare benefits may not be discontinued without such an evidentiary hearing, this Court made specific reference to a case dealing with unemployment compensation terminations—*Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967)—for the proposition that a pre-termination evidentiary hearing is required when the loss of governmental benefits causes severe personal deprivation.[33] Thus, in distinguishing welfare terminations from the termination of such other governmental entitlements as contracts and tax exemptions, 397 U.S. at 264, the Court in *Goldberg* recog-

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32. *See also* Armstrong v. Manzo, 380 U.S. 545 (1965); Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941); Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292 (1937); Southern Railway Co. v. Virginia, 290 U.S. 190 (1933); Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915); Garfield v. Goldsby, 211 U.S. 249 (1908); Londoner v. City and County of Denver, 210 U.S. 373 (1908); Security Trust Company v. Lexington, 203 U.S. 323 (1906); Hovey v. Elliot, 167 U.S. 409 (1897); Windsor v. McVeigh, 93 U.S. 274 (1876); *cf.* Connell v. Higginbotham, 403 U.S. 207 (1971).

33. The Court stated in Goldberg: "For qualified recipients, welfare provides the means to obtain essential food, clothing, housing and medical care. *Cf.* Nash v. Florida Industrial Commission, 389 U.S. 235, 239 (1967)." 397 U.S. at 264.

nized that similar deprivation is present in the case of unemployment compensation terminations.[34]

Such terminations present an even more compelling case for a prior evidentiary hearing than do welfare terminations. The factual issues in unemployment cases are more complex, necessitating a full evidentiary hearing in order to obtain accurate decisions; the governmental interest in summary adjudication is far less, since substantial recoupment of overpayments is available; like welfare, unemployment benefits are vitally needed, often providing the sole means of subsistence, but unlike welfare, unemployment compensation is an earned "contractual right"[35] which workers rely upon being available should they become involuntarily unemployed.[36]

A

SINCE THE SUMMARY TERMINATION OF UNEMPLOYMENT COMPENSATION IMPOSES SEVERE ECONOMIC INJURY, INVOLVES COMPLEX FACTUAL ISSUES, AND SERVES NO OVERRIDING GOVERNMENTAL INTEREST, A PRIOR EVIDENTIARY HEARING IS CONSTITUTIONALLY REQUIRED.

1. The Termination of Unemployment Benefits Without a Prior Evidentiary Hearing Imposes Severe Hardship on Eligible Recipients.

At the very inception of the unemployment compensation program, this Court emphasized the singular importance of unemployment benefits in staving off the "evils of the

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34. As was recognized in Crow v. California Department of Human Resources Development, 325 F.Supp. 1314, 1318 (N.D. Cal. 1970), "it is *welfare*, not unemployment compensation . . . which was for the longest time deemed outside the protections of the due process clause. . . . It would be anomalous indeed if the Supreme Court's extension of procedural guarantees to welfare eligibility determinations was used to justify a restriction of similar rights previously recognized in other areas."

35. *See* California Department of Human Resources Development v. Java, 402 U.S. 121, 131 (1971); *see also* Div.Br. at 14.

36. In Board of Regents of State Colleges v. Roth, ... U.S. ....., ..., 92 S.Ct. 2701, 2709 (1972), the Court stated that a major purpose of procedural due process is "to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."

attendant social and economic wastage" caused by unemployment. *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495, 516 (1937). Thirty years later in *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), a unanimous Court pointed out that the improper termination of unemployment benefits for a substantial period would cause an unemployed worker to "risk financial ruin." 389 U.S. at 239. In the words of Mr. Justice Black:

> Even the hope of a future award of back pay may mean little to a man of modest means and heavy responsibilities faced with the immediate severance of sustaining funds.

Id. As recently as 1971, in *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971), this Court reiterated the "obvious" importance of unemployment compensation to the newly unemployed worker, since it provides cash "at a time when otherwise he would have nothing to spend." 402 U.S. at 131.[37]

The unemployment compensation system is part of the 1935 Social Security Act's comprehensive scheme of providing for the general welfare of all Americans during a period when they might otherwise be subject to severe economic deprivation. *See Helvering v. Davis*, 301 U.S. 619, 641-45 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548, 586-87 (1937). Unemployment benefits serve to provide subsistence payments to unemployed workers and their families at a time when they have lost their source of income. Although providing greater dignity and security, they were intended to be complementary in nature and design to the Social

37. *See also* concurring opinion of Mr. Justice Douglas, California Department of Human Resources Development v. Java, *supra*, 402 U.S. at 136 (1971).

Security Act's welfare programs, providing the same sustenance for unemployed workers as welfare provides for the blind, disabled, young and aged. *See Java, supra; King v. Smith,* 392 U.S. 309, 327-33 (1968).

Thus, while the unemployment compensation system is financed under insurance principles, "the insurance technique is a means to the welfare end." BECKER, THE INADEQUACY OF BENEFITS IN UNEMPLOYMENT INSURANCE, IN AID OF THE UNEMPLOYED [hereinafter "BECKER"], 80 (1965). A detailed case by case inquiry into individual necessities is not required, since need is based on class studies and "operates in terms of averages." BECKER, *supra.* Thus, a higher paid worker receives a small portion of his wages than does a lower paid worker; all eligible workers receive minimum benefits of uniform duration, regardless of the fact that their earnings may be disproportionately low; the amount of benefits a worker receives increases with the number of his dependents. *See* IND. ANN. STAT. §§ 52-1528b, 1536a(a), 1536c (Burns 1964 Repl. 1972 Supp.); BECKER, *supra* at 81. But while average rather than individual need is the criterion, the *raison d'etre* of the system is to meet individual needs:

> It is sometimes said that unemployment insurance is not based on need. Stated thus, without qualification, the proposition contains a grave error.... If in 1935 we had not judged that there existed a need which individuals were incapable of meeting themselves, unemployment insurance would not have been established. BECKER, *supra* at 81.[38]

In holding that unemployment benefits may not be terminated or suspended without a prior evidentiary hearing, a three-judge district court in Vermont pointed out:

> The fact that unemployment benefits are paid without reference to need, that is to say, without reference to a

38. *See* California Department of Human Resources Development v. Java, *supra,* 402 U.S. at 130.

> means test, does not mean that a given claimant's need is qualitatively different from that of a welfare recipient. While such need may from time to time not be, in *Goldberg's* turn of phrase, "brutal," speaking quantitatively, it is nonetheless compelling in the constitutional sense; the payment of unemployment benefits to those entitled to them permits retention of the basic human dignity that past accomplishment alone merits, avoiding in Macauley's stark phrase, sinking, after many vicissitudes of fortune, into "abject and hopeless poverty." [citation omitted].

Wheeler v. Vermont, 335 F.Supp. 856, 861-62 (D.Vt. 1971).[39]

Empirical data confirms the vital role of unemployment benefits. For the average recipient, unemployment imposes severe financial hardship even with the uninterrupted payment of benefits. The median liquid assets available to a typical worker's family[40] to meet an emergency is only $260.00. KATOMA, SURVEY OF CONSUMER FINANCES, Table 6-3 at 100 (1970). But unemployment is especially likely to fall upon workers without any liquid assets.[41] Fifty-three percent of all unemployed workers in Indiana who are found eligible

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39. As Judge Lasker pointed out in his dissent in Torres v. New York State Department of Labor, *supra,* 321 F.Supp. at 439: "the 'brutal need' standard referred to in Goldberg relates to actual financial want and not eligibility requirements."

40. There are 39,303,000 families in the United States and 9,136,000 unrelated individuals. The average family has 3.54 members. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, Table 40 at 35 (1970).

41. Even when employed, the average unemployment compensation recipient is hardly able to keep above the poverty line. In California, for example, the median annual earnings of unemployment compensation recipients was $3,933. CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, CLAIMANTS WHO FILED VALID NEW CLAIMS OCTOBER 1966-SEPTEMBER 1967, REPORT No. 416, No. 6 at 3 (April 1, 1970); in New York, more than 40% of unemployment compensation recipients earned less than $3,000 and more than 70% earned less than $5,000 in 1967. NEW YORK STATE DEPARTMENT OF LABOR, UNEMPLOYMENT INSURANCE BENEFICIARIES (March 1970).

for unemployment benefits file more than one claim per benefit year. INDIANA EMPLOYMENT SECURITY DIVISION, SOME SIGNIFICANT STATISTICS ABOUT UNEMPLOYMENT INSURANCE IN INDIANA [hereinafter "SIGNIFICANT STATISTICS"] Table 8 at 7 (March 1972). Employees who experience more than one unemployment episode per year are usually unable to build up cash reserves for periods of sudden unemployment. Since an unemployed worker must wait at least three weeks before unemployment benefits initially commence, *see* MANUAL § 13130; *Java, supra,* 402 U.S. at 126, all of his savings will ordinarily have been exhausted by the time payments begin.

Once payment of benefits does begin, the amount of money a recipient receives constitutes only a fraction of his former salary.[42] In order to adjust to the acute curtailment of family income, basic necessities often have to be sacrificed. According to one survey, twenty-six percent of households receiving unemployment benefits must resort to reductions in food expenditures, usually in the first week of unemployment. *See* P. KLEIN, FINANCIAL ADJUSTMENTS TO UNEMPLOYMENT 35, 40 (1965). Many recipients are forced to default on fixed obligations.[43] In over one-quarter of the households receiving unemployment compensation, the family is forced to go into debt during the year of unemployment. *See* P. KLEIN, *supra* at 3. It is expected that this percentage is even higher among the recipients presently before this

42. In 1971, unemployment benefits in Indiana constituted less than 28% of the average wages of workers covered by the unemployment compensation program. SIGNIFICANT STATISTICS, *supra,* Table 6 at 6.

43. *See* Note, *The Relationship of Unemployment to Mortgage Foreclosure,* 86 MONTHLY LAB. REV. 1421, 1422 (1963). Approximately 30% of all unemployment compensation claimants become delinquent in payments on new appliances, and 14% become delinquent in rent payments. *See* P. KLEIN, FINANCIAL ADJUSTMENTS TO UNEMPLOYMENT 31 (1965).

Court who, although found eligible for benefits for a fixed duration, receive no funds for many months pending an evidentiary hearing. For these unemployed workers, the loss of unemployment benefits may be devastating. A study based on over five million unemployment compensation recipients points out that "the combination of all other types of non-wage income contributed less to the aggregate income of the unemployed than did unemployment insurance." Stein, *Special Labor Force Report: Work History, Attitudes & Income of the Unemployed*, 86 MONTHLY LAB. REV. 1405, 1411 (1963).

For the unemployment compensation recipient whose benefits are summarily terminated, welfare or charity is either unavailable or poses a cruel[44] and inadequate substitute for unemployment benefits. There are four categorical public assistance programs created by the Social Security Act and administered by the states: Blind Assistance, IND. ANN. STAT. §§ 52-1221—52-1239b (Burns 1964 Repl., 1972 Supp.); Disability Assistance, IND. ANN. STAT. §§ 52-1251a—52-1251v (Burns 1964 Repl., 1972 Supp.); Old Age Assistance, IND. ANN. STAT. §§ 52-1201—52-1220 (Burns 1964 Repl., 1972 Supp.); and Aid to Families with Dependent Children, IND. ANN. STAT. §§ 52-1240—52-1251 (Burns 1964 Repl., 1972 Supp.). Since an unemployment compensation recipient would have to be blind, disabled, or of retirement age to qualify for the first three categories, these

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44. As Congress recognized in instituting a national unemployment compensation program, the unemployed worker, having worked and provided for his own needs, may feel that his dignity, privacy, reputation, and self-respect have been compromised if he is forced onto the welfare rolls. *See* P. DOUGLAS, STANDARDS OF UNEMPLOYMENT INSURANCE 20 (1933); Handler & Hollingsworth, *Stigma, Privacy and Other Attitudes of Welfare Recipients*, 22 STAN.L. REV. 1 (1969). Moreover, one of the chief purposes of the unemployment compensation program is to provide income for an unemployed worker "without the necessity of his turning to welfare or private charity." Java, *supra*, 402 U.S. at 131.

would generally not be available to him, as he, by definition, must be eligible for the labor market. IND. ANN. STAT. §§ 52-1538a—52-1538b (Burns 1964 Repl., 1972 Supp.). In order to qualify for the fourth category (AFDC), the worker would have to be the only able bodied parent in a household with children under eighteen years of age, a requirement which excludes all workers without children, and the overwhelming proportion of workers with spouses.[45] Furthermore, to receive AFDC assistance a family must have less than $700 in assets. INDIANA PUBLIC ASSISTANCE MANUAL, Chapter IV-B-10.

Nor are local emergency relief programs a feasible alternative. If an unemployment compensation recipient's benefits are terminated for either refusing an offer of "suitable" work or being "unavailable" for work—as is the case in most unemployment compensation terminations—it will be virtually impossible for him to qualify for emergency relief.[46] Moreover, in the unlikely event that he does qualify, emergency relief cannot be counted on to provide even a bare subsistence level of benefits. Unlike many states, Indiana does not even have a county-operated general assistance

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45. Unlike some states, Indiana does not provide AFDC assistance for children of an unemployed father. The AFDC program for dependent children of unemployed fathers (AFDC-U) was established by § 407 of the Social Security Act (42 U.S.C. § 607), with participation by the states made optional. Indiana has chosen not to participate in the program. Even in those states participating in the AFDC-U program, a claimant who is denied unemployment compensation for allegedly refusing a suitable work offer will automatically be denied AFDC-U. 42 U.S.C. § 607(b)(1)(B).

46. As a condition of establishing eligibility for local emergency relief, IND. ANN. STAT. § 52-152(a) (Burns 1964 Repl., 1972 Supp.) provides:

> If the poor persons applying are in good health, or if any members of their families are so, the overseer shall insist that those able to labor shall seek employment, and he shall refuse to furnish any aid until he is satisfied that the persons claiming help are endeavoring to find work for themselves.

program. Emergency relief is a wholly local program funded by local resources and administered by township trustees without any state standards.[47] *See generally* IND. ANN. STAT. §§ 52-139—52-199 (Burns 1964 Repl., 1972 Supp.). Over 1000 township programs exist in the state[48] varying widely in coverage and amount of benefits provided.

Thus, an unemployed wage earner whose unemployment benefits have been summarily terminated is either entirely excluded from all forms of relief[49] or would suffer financial ruin in the unlikely event that he is found qualified for local emergency relief. And, even if eligible for welfare, he would first be required to undergo a humiliating eligibility investigation[50] by the local welfare agency which may not be completed for a number of weeks.[51] Thus, not only does he and his family suffer great embarrassment if forced onto welfare, he is also precluded from receiving any income whatsoever during the critical short term period when Congress intended unemployment compensation to be paid.[52]

The wrongful termination of unemployment benefits for many months may, therefore, cause economic catastrophe. As the court below found in its ruling of May 7, 1971 grant-

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47. See Horowitz and Neitring, *Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State*, 15 U.C.L.A. L.REV. 787, 813 (1968).

48. For a listing of the townships, *see* IND. ANN. STAT. §§ 65-211, 65-220 (Burns 1961 Repl.).

49. *See* Judge Lasker's dissenting opinion in Torres v. New York State Department of Labor, *supra*, 321 F.Supp. at 439.

50. *See e.g.*, IND. ANN. STAT. § 52-149 (Burns 1964 Repl.) (investigation by "overseer of the poor"); IND. ANN. STAT. § 52-153 (Burns 1964 Repl.) (duty of "overseer of the poor" to contact recipient's relatives).

51. *See e.g.* INDIANA PUBLIC ASSISTANCE MANUAL, Chapter VII-A-1 which provides that the determination of AFDC eligibility need not be completed for 30 days.

52. *See* p. 16, *supra;* Div. Br. at 14.

ing Mrs. Burney a temporary restraining order: "the continued withholding and termination of unemployment compensation benefits will deprive [her] of the source of income necessary to meet her food, clothing and shelter needs."

Defendants rely on *Torres v. New York State Department of Labor,* 321 F.Supp. 432 (S.D.N.Y.) (three-judge court), *vacated* 402 U.S. 968, *judgment reinstated* 333 F.Supp. 331 (1971), *aff'd* 405 U.S. 949 (1972), *petition for rehearing continued for further consideration* 40 U.S.L.W. 3001 (June 30, 1972), for the proposition that *Goldberg* does not apply to unemployment terminations. Without citation of authority, and on the basis of a "sparce and superficial" record, 321 F.Supp. at 439 (dissenting opinion), the majority in *Torres* assumed that "brutal need" was not present in the unemployment compensation context and that retroactive benefits, payable many months after termination, met the needs of unemployment recipients. Apart from the *Torres* majority, every other court considering the issue has explicitly rejected the *Torres* rationale,[53] including a three-

53. *See* note 30, *supra.*

After a long and tortured history, the Torres case is again pending before this Court. The factual situation of the subclass represented by plaintiff Torres is unusual, anomalous, and clearly distinguishable from the present case. *See* Div. Br. at 7n.3. Unlike the situation of both Mrs. Burney and her class and the welfare recipients in Goldberg v. Kelly, *supra,* plaintiff Torres' case involves a question of *initial* rather than continuing eligibility.

Plaintiff Torres was ineligible for benefits from the outset and received them only through a fluke. The Department had incorrectly addressed the questionnaire it sent to Torres' last employer asking the reasons for Torres' termination from employment. The employer did not receive the form and consequently did not have an opportunity to provide information concerning Torres' initial eligibility. *Compare* California Department of Human Resources Development v. Java, 402 U.S. 121 (1971). Upon finally receiving a remailed questionnaire, the employer supplied the relevant information. On the basis of the information supplied by the employer, the Department "reconsidered" Torres' case and found that he had

judge district court in the same circuit.[54] Both empirical data and congressional findings demonstrate that unemployment compensation benefits are "vitally needed." And this Court has specifically stated that lump sum payments many months later are unlikely to make the recipient whole. *Nash v. Florida Industrial Commission, supra,* 389 U.S. at 239.

As in *Goldberg,* then, the "crucial factor" of need pervades this case.[55] Having been found initially eligible for unemployment compensation, the recipient has by definition involuntarily lost his last job. Weeks may pass before he

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never met initial eligibility requirements. Torres v. New York State Department of Labor, *supra,* 321 F.Supp. at 435.

The Torres case also involves a second, separate subclass represented by plaintiff Dinger. The issue raised in Dinger's case is similar to the issue presented herein by Mrs. Burney: whether unemployed workers who have fully met initial eligibility requirements may subsequently be terminated without a prior evidentiary hearing for reasons unrelated to their initial eligibility. The decision on this issue need have no bearing on the disposition of the issue presented by the subclass represented by plaintiff Torres.

54. *See* Wheeler v. Vermont, 335 F.Supp. 856, 861 (D. Vt. 1971). As the court stated therein:

> . . . we agree with Mr. Justice Douglas, concurring in Java, 402 U.S. at 135, Judge Lasker dissenting in Torres, 321 F. Supp. at 438, the California district court in Crow, *supra,* and the district court in Java that unemployment compensation benefits cannot be treated differently from the welfare benefits in Goldberg v. Kelly. . . .

Cf. Fuentes v. Shevin, 407 U.S. 67, ..., 92 S.Ct. 1983, 1998-99 (1972).

55. The unemployment compensation recipient whose benefits are summarily terminated is in far more desperate straits than the wage earner whose paycheck was garnished in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). Under the Wisconsin prejudgment garnishment statute declared unconstitutional in Sniadach, a worker continued to receive a statutory "subsistence allowance" of $25.00 to $40.00 per pay period. 395 U.S. at 338 n.1. For the unemployment compensation recipient, the entire "subsistence allowance" is terminated, and nothing whatever is paid pending the hearing in his case. Even more than prejudgment garnishment, therefore, the summary termination of unemployment benefits "may as a practical matter drive a wage-earning family to the wall." Sniadach, *supra,* 395 U.S. at 341-42.

is able to find new work, especially in a period of widespread unemployment.[56] Here, as in *Goldberg*:

> The termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits.

Goldberg v. Kelly, supra, 397 U.S. at 264.

2. Since the Termination of Unemployment Compensation Involves Complex Factual Issues, a Prior Evidentiary Hearing Is Especially Necessary to Prevent the Wrongful Denial of Benefits.

"The essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property." *Fuentes v. Shevin,* 407 U.S. 67, ..., 92 S.Ct. 1983, 2002 (1972). The striking unfairness of the Division's present summary termination procedure is revealed by the fact that it repeatedly and systematically results in the erroneous termination of benefit payments to *eligible* recipients. For example, during the first three months of 1972, 49.2 per cent of all appealed Division decisions to terminate benefits were reversed at Referee hearings. U.S. DEPT. OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 18 at 10 (May, 1972). This figure far exceeds the reversal rate of 36 per cent for welfare terminations, which the district court in *Goldberg* described as a "startling statistic."[57] The consistent unreliability[58] of the informal

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56. The Indiana seasonally adjusted unemployment rate averaged 5.6% in 1971. *See* ANNUAL REPORT, *supra,* at 19.

57. *See* Kelly v. Wyman, 294 F.Supp. 893, 901 (S.D.N.Y., 1968) (three-judge court); *see also* Crow v. California Department of Human Resources Development, 325 F.Supp. 1314, 1318 (N.D. Cal. 1970). As the U.S. Court of Appeals for the Fifth Circuit stated in another context: "We do not abdicate our judicial role to statistics. But when figures speak, we must listen." Hall v. St. Helena Parish School Board, 417 F.2d 801, 809 (5th Cir. 1969).

58. The current reversal rate of 49.2% is not atypical. In the calendar year 1971, 45.9% of all appealed decisions terminating

interview process used by the Division underscores the fact that the procedures traditionally required by due process are not mere "niceties" (J.S. at 10) or "labels" (Cal. Br. at 13), but rather are essential to protect unemployed workers against arbitrary governmental action.[59] Indeed, in cases of appealed unemployment compensation terminations, the Division would have achieved a similar degree of accuracy merely by flipping a coin.

A prior evidentiary hearing is particularly necessary to achieve accurate decisions in unemployment termination cases. Such hearings are essential "where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970). The issues most frequently arising in unemployment cases are, in the words of the court in *Crow v. California Department of Human Resources Development*, 325 F.Supp. 1314, 1316 (N.D. Cal. 1970), "preeminently factual." Such cases often present many of the following questions: Was the recipient available for work? Did he make an adequate effort to secure work? Did he adequately investigate job prospects at a union hiring hall? Did he display the proper attitude and behavior at job interviews? Did he place improper restrictions on the types of jobs he would consider? Has he taken any action that would preclude an offer of employment? Did he comply with Division reporting requirements? Did he

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eligibility were reversed by Referees. U.S. DEPT. OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 18a at 14 (March 1972). In 1970, the reversal rate was 40.3%, and in 1969 it was 42.1%. U.S. DEPT. OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 18 at 13 (March 1970).

59. In Fuentes v. Shevin, 407 U.S. 67, ..., 92 S.Ct. 1983, 2002 (1972) the Court recognized as "axiomatic that the hearing must provide a real test."

make a willful misstatement in order to obtain benefits? Did he hold a job while drawing benefits? Was he physically able to work? Did he receive and refuse an offer for work? If so, was the work "suitable"? Did he receive sufficient information relative to the duties, hours of work and working conditions to enable him to make a determination as to the suitability of the work? Did a prospective job involve a risk to his health, safety or morals? Was he physically fit to perform this particular job? Did the prospective job comport with his prior training and experience? What is the nature of the job market in his customary occupation? Has the period of his unemployment been so long as to require him to accept a less skilled and lower-paying job? Is a prospective job located within a reasonable commuting distance from his home? See IND. ANN. STAT. §§ 52-1538a, 52-1538b, 52-1539a (Burns 1964 Repl., 1972 Supp.); § 52-1540 (Burns 1964 Repl.). *See also* 4 C.C.H. UNEMPL. INS. RPTR., Ind. §§ 1001, *et seq.* The answer to each of the above questions frequently involves a subjective judgment of the character and honesty of recipients and the application of complicated legal standards to a variety of disputed facts. It also involves the evaluation and interpretation of third party information provided by sources other than the recipient and the Division interviewer.[60]

As the Division concedes, third party information is frequently dispositive.[61] *See Crow v. California Department of Human Resources Development*, 325 F.Supp. 1314, 1318-20 (N.D.Cal. 1970). For example, a prospective employer is often the source of information regarding such issues as

60. *See, e.g.*, Gardner v. Review Board of Indiana Employment Security Division, 267 N.E.2d 844 (Ind.App.Ct. 1971); Walton v. Wilhelm, 120 Ind.App. 218, 91 N.E.2d 373 (1950).

61. "Information might come from the report on a job referral from the Division or from any other source." Div. Br. at 18.

whether a job offer was actually made,[62] a recipient's attitude, enthusiasm and behavior during a job interview, the conditions of the job, and whether a job offer was refused.[63] Outside informers of questionable veracity may, as in many of the welfare terminations in *Goldberg v. Kelly*, 397 U.S. 254 (1970),[64] supply "tips" used to disqualify recipients. This particularly occurs in cases involving a recipient's alleged failure diligently to look for work or his secretly working. Division personnel other than the interviewing clerk may provide information regarding the violation of instructions they have purportedly given to the recipient. Other cases turn on objective facts provable only by third parties, as when issues are raised concerning the condition of the local job market or the availability of child care facilities.

In Mrs. Burney's case, for example, the question of whether she "refused an offer of suitable work" under IND. ANN. STAT. § 52-1539a (Burns 1964 Repl., 1972 Supp.) or was "unavailable for work" under IND. ANN. STAT. § 52-1538b (Burns 1964 Repl., 1972 Supp.) required a determination of the availability of child care and public transportation after midnight, the safety of public transportation at that hour, Mrs. Burney's physical condition, the prospects of her obtaining work at other hours and her independent efforts to do so, and whether the job she was

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62. *See* Wheeler v. Vermont, 335 F.Supp. 856, 858-59 (D.Vt. 1971); Crow v. California Department of Human Resources Development, 325 F.Supp. 1314, 1319 n.3 (N.D.Cal. 1970).

63. In cases of offers of re-employment by "base-period" employers, these sources will have a direct economic stake in disqualifying the recipient, since the taxes they are required to pay into the Employment Security Fund vary in proportion to the amount of benefits paid to their ex-employees. IND.ANN.STAT. § 52-1535 (Burns 1964 Repl., 1972 Supp.). *Cf.* Sniadach v. Family Finance Corp., 395 U.S. 337, 338-39 (1969).

64. In Kelly v. Wyman, 294 F.Supp. 893, 905 (S.D.N.Y. 1968) (three-judge court), Judge Feinberg describes how plaintiff Velez was "cut off on the basis of untrue rumors and reports."

offered matched her qualifications. *See Hacker v. Review Board of Indiana Employment Security Division,* 271 N.E.2d 191 (Ind. App. Ct. 1971)[65]; *Renwanz v. Review Board of Indiana Employment Security Division,* 267 N.E.2d 844 (Ind. App. Ct. 1971).

Unemployment compensation termination cases are thus classic examples of instances where governmental action is challenged "as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." *Goldberg v. Kelly, supra,* 397 U.S. at 268. Even more than in the welfare terminations at issue in *Goldberg,* the complexity of the issues and the nature of the evidence make an evidentiary hearing necessary to prevent the wrongful termination of unemployment benefits. Yet under the Division's termination procedure challenged in this case, the decision whether an unemployed worker will continue to receive unemployment benefits—a decision which may be of monumental importance to him and his family—is made at an informal "interview" by an often harried clerk who each week must process hundreds of recipients.

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65. The Division and amicus employers falsely suggest that the decision to terminate Mrs. Burney was made without knowledge of the Hacker opinion. (Div.Br. at 18, n. 2; Employers' Amicus Brief [hereinafter "Employer Br."] at 4-5). To the contrary, the record shows that the Referee considered and indeed distinguished Hacker in deciding Mrs. Burney's case. *See* Referee Decision, appended to Defendant's Response to Request for Admissions. Moreover in reversing the Referee, the Review Board did not even cite, let alone rely upon, the Hacker decision. In the matter of Burney, Ind. Employment Security Div. Review Bd., Case No. 71-R-297 (Dec. 6, 1971).

In any event, Hacker marked no new departure in the applicable law. Citing Nelson v. Review Board of Employment Security Division, 119 Ind.App. 10, 16, 82 N.E.2d 523, 526 (1949), the Hacker court merely reaffirmed that "the determination of whether a given individual is available for work is a question of fact to be determined in light of the circumstances of each particular case." *See* Hacker v. Review Board of Indiana Employment Security Division, 271 N.E.2d 191, 196-97 (Ind. App. Ct. 1971).

The Division's informal termination interview does not contain the "rudimentary due process" elements of an evidentiary hearing specified in *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970). Rather than receiving "timely and adequate notice detailing the reasons for a proposed termination," *Goldberg, supra*, 397 U.S. at 267-68, a recipient usually first learns of the Department's proposed actions and the reasons therefor at the beginning of his periodic interview. Not having been forewarned of the issues involved, he has been unable to gather evidence or locate and present witnesses. He has likewise had virtually no time to familiarize himself with his substantive rights as a recipient or to secure representation.[66] This lack of adequate prior notice completely nullifies a recipient's supposed rights to prepare a defense, secure counsel, and personally present his case "at a meaningful stage in the proceedings." *See* Cal.Br. at 10. As this Court stated years ago:

> It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose .... [A] man should not be required . . . instantly to answer a charge ... on the same or even the next day, and should be allowed not only ample time to obtain legal advice and assistance, but also to collect his evidence; and even the convenience of witnesses should be considered; and therefore, in general, several days should intervene between the time of [notice] and hearing.

Roller v. Holly, 176 U.S. 398, 409-10 (1900).[67]

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66. Recipients may be represented in unemployment termination proceedings either by lay representatives or by counsel. IND. ANN. STAT. § 52-1558a (Burns 1964 Repl.). Representation is frequently provided by labor unions and legal assistance programs.

67. *See also* Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950); Morgan v. United States, 304 U.S. 1, 25 (1938).

Goldberg further recognized that "in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses." *Goldberg, supra,* 397 U.S. at 269-70. But at the Division's termination interview, a recipient is allowed no opportunity to confront and cross-examine the many outside sources whose information may be the basis for his disqualification. Without the historic rights of confrontation and cross-examination, a recipient has no viable means of rebutting the case against him. He is at the mercy of "individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." *Greene v. McElroy,* 360 U.S. 474, 497 (1959). As this Court pointed out in *Greene, supra:*

> . . . [T]he requirements of confrontation and cross-examination . . . have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion . . . in all types of cases where administrative . . . actions were under scrutiny.

360 U.S. at 497-98. [citations omitted].

Goldberg also specified that a terminated recipient is entitled to "an impartial decision-maker" and a decision "rest[ing] solely on the legal rules and evidence adduced at the hearing." *Goldberg, supra,* 397 U.S. at 271. However, the interviewing clerk responsible for terminating benefits may have had a previous long and hostile involvement with the recipient, *see* Harris, *Claimant Views of Unemployment Insurance Administration in California,* 4 UNEMP. INS. REV. 2 (1967), or may have given the very Division instructions whose issuance or reasonableness is in question. He also is under no stricture to rest his decision solely on the legal

rules and evidence adduced at the interview; thus he may base the ruling on his own background and knowledge or on information obtained outside the interview.

Lacking the procedural safeguards specified in *Goldberg*, the accuracy of the Division's pre-termination interview[68] depends solely on an interviewing clerk's inclination, ability and time to seek out and judge relevant information, and on the ability of recipients who are frequently of limited education to marshal and articulate their cases on the spur of the moment to an accusing Division official.[69] The likelihood of error inherent in these circumstances is confirmed by the fact that in almost one-half of the appealed cases, the Division is found to have arrived at erroneous decisions.[70]

The Division contends that because the Referee hearing held several months "after the fact"[71] contains the elements specified in *Goldberg*, its procedures satisfy due process.

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68. In Goldberg's companion case, Wheeler v. Montgomery, 397 U.S. 280 (1970), the Court struck down a pre-termination informal interview procedure similar to that utilized by the Division. Unlike the Division's procedure, in which no effective notice is provided, the welfare interviews in Wheeler at least were preceded by three days' advance notice.

69. In discussing the unemployment clerk's counterpart in the welfare system, the Court in Goldberg specifically recognized the great "possibility of honest error or irritable misjudgment" in his decisions. Goldberg v. Kelly, 397 U.S. 254, 266 (1970), *quoting* Kelly v. Wyman, 294 F.Supp. 893, 904-05 (S.D.N.Y. 1968) (three-judge court).

70. See nn. 6 and 58, *supra*.

71. After summarily terminating recipients, the Division does not even afford them a prompt post-termination evidentiary hearing. In 1971, only 0.5% of all Referee hearings were decided within 30 days; only 4.5% were decided within 45 days; and only 27.7% were decided within 75 days. U.S. DEPT. OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 17a at 12 (March, 1972).

Div.Br. at 16, 18. *See also* EmployerBr. at 18.[72] In *Goldberg's* companion case, *Wheeler v. Montgomery*, 397 U.S. 280 (1970), *rev'g.* 296 F.Supp. 138, 140 (N.D.Cal. 1968), this Court rejected an identical argument. *See also Stanley v. Illinois*, 405 U.S. 645, ..., 92 S.Ct. 1208, 1210 (1972). As was recently reaffirmed in *Fuentes v. Shevin*, 407 U.S. 67, ..., 92 S.Ct. 1983, 1994-95 (1972):

> If the right to notice and a hearing is to serve its full purpose, then, it is clear it must be granted at a time when the deprivation can still be prevented .... No later hearing and no damage award can undo the fact that the arbitrary taking . . . has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." [citation omitted].

For most unemployed workers, the severe personal deprivation caused by the wrongful termination of benefits can never be cured by the repayment of benefits many months later.[73]

3. No Overriding Governmental Interest Justifies Terminating the Payment of Benefits Without a Prior Evidentiary Hearing.

Because of the potential for harsh, erroneous, and arbitrary results, this Court has narrowly restricted the use

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72. The Division characterizes the "rudimentary" procedures specified in Goldberg and ordered by the court below as being "somewhat more formal and exacting than a court trial." Div.Br. at 18. The Division's post-termination practices belie this contention. In the Division's post-termination Referee hearing, the elements specified in Goldberg are all provided. Indiana statutes specifically allow such hearings to be held without "common law or statutory rules of evidence and other technical rules of procedure." IND.ANN.STAT. § 52-1542e (Burns, 1964 Repl.). In their amicus brief, Indiana's employers more realistically acknowledge that the post-termination Referee hearing is "designed to assure informality and fairness." EmployerBr. at 13.

73. *See* Section II-A-1 of this Brief, *supra.*

of summary procedures to a limited category of cases. Circumstances justifying summary procedures under the due process clause have been described as "emergency situations," *Bell v. Burson*, 402 U.S. 535, 542 (1971), "extraordinary," *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) and "truly unusual," *Fuentes v. Shevin;* 407 U.S. 67, ..., 92 S.Ct. 1983, 1999 (1972).[74] A review of the cases in which "emergency situations" justifying summary procedures were found to exist reveals that they bear no resemblance to the Division's alleged interests in this case: *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (seizure of food not fit for human consumption); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (seizure of mislabled vitamin product); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (conservatorship of insolvent saving and loan association); *Yakus v. United States*, 321 U.S. 414 (1944) (adoption of wartime price regulations); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961) (access to military installation).[75]

The primary governmental interest advanced to justify summarily terminating unemployment benefits is the desire to minimize administrative inconvenience and expense. Div. Br. at 19, EmployerBr. at 11, Cal. Br. at 2. In *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970), similar considerations were also urged to justify terminating welfare benefits prior to an evidentiary hearing. Despite the fact that substantial expenditures were involved, 397 U.S. at 266, this Court held that the factors of expense and administrative convenience did not justify denying a pre-termination evidentiary hearing. 397 U.S. at 261. As this Court stated:

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74. In his concurring opinion in Sniadach v. Family Finance Corp., 395 U.S. 337, 343 (1969), Mr. Justice Harlan used the phrase "essential to protect a vital governmental interest."

75. *See* additional cases collected in Fuentes v. Shevin, 407 U.S. 67, ..., 92 S.Ct. 1983, 1999-2000 (1972).

> The interest of the eligible recipient in uninterrupted receipt of public assistance coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.

397 U.S. at 266.[76]

While *Goldberg* holds that the desire to minimize the expenditure of government funds does not, in any event, justify summarily terminating the payment of benefits, it should be noted that the amount of expenditures necessitated by pre-termination evidentiary hearings in the unemployment compensation program are minimal in comparison to the amount of expenditures necessitated by such hearings in welfare. In welfare, any benefits wrongfully paid to recipients pending an evidentiary hearing are likely to be unrecoverable, since welfare recipients "are likely to be judgment-proof." *Goldberg, supra,* 397 U.S. at 266. Unemployment compensation recipients, on the other hand, are by definition employable, IND. ANN. STAT. § 52-1538b (Burns 1964 Repl., 1972 Supp.), and thus are likely to return to work in the future and accumulate sufficient funds to satisfy any amounts owed the Division because of an overpayment.

The Division has ample means of recouping any overpayments that may occur. If an overpayment is not voluntarily

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76. Just last term, in Stanley v. Illinois, 405 U.S. 645, ..., 92 U.S. 1208, 1215 (1972), the Court reaffirmed this principle. As Mr. Justice White stated:

> The Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy governmental officials no less and perhaps more than mediocre ones.

repaid, the Division can both offset the amount owed against any future benefits to which the recipient may become entitled, IND. ANN. STAT. § 52-1537(b) (Burns 1964 Repl., 1972 Supp.),[77] and institute civil proceedings to recover the overpayment, IND. ANN. STAT. § 52-1537(e) (Burns 1964 Repl., 1972 Supp.). Criminal sanctions may also be imposed and restitution ordered if a recipient makes a false statement or fails to disclose material facts. IND. ANN. STAT. § 52-1559 (Burns 1964 Repl., 1972 Supp.). The striking ability of the Division to recover overpayments is proved by its own statistics, which show that in 1971, approximately 72% of all overpayments made to ineligible recipients were recouped. ANNUAL REPORT, *supra* at 34.

The Division also has available alternative means of reducing overpayments that do not entail terminating the "sustaining funds"[78] of eligible recipients. As this Court pointed out in *Goldberg, supra,* 397 U.S. at 266:

> Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities.

See also Wheeler v. Vermont, 335 F.Supp. 856, 862 (D.Vt. 1971) (three-judge court). By increasing the number of Referees, the Division could markedly reduce the unreasonably long period between the filing of an appeal and the

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77. Offsetting overpayments against future benefits is a highly effective device, since approximately 53% of all eligible claimants file more than one claim in the same benefit year. *See* SIGNIFICANT STATISTICS, *supra* at 7. Moreover, since the maximum period of unemployment compensation eligibility is generally 26 weeks, recoupment from recipients whose benefits are suspended for 5 or 10 week periods can sometimes be accomplished during the same period of unemployment.

78. Nash v. Florida Industrial Commission, 389 U.S. 235, 239 (1967).

issuance of a Referee's decision.[79] Since the Division's administrative costs are reimbursed by the federal government[80] and may not be drawn from the Employment Security Fund, 42 U.S.C. §§ 503(a), 1103(c) (1), the hiring of additional Referees would have no effect on the amount of money available for the payments of benefits.

In contending that prior evidentiary hearings run counter to their interest in minimizing administrative inconvenience, the Division ignores the many important governmental interests that are advanced by the payment of benefits pending an evidentiary hearing. *See* pp. 17-23 of this Brief, *supra; see also California Department of Human Resources Development v. Java,* 402 U.S. 121, 130-33 (1972). Indeed the Division has conceded that, to accomplish the purposes of its unemployment compensation program, benefits must be paid to eligible recipients during the "short term" period in which they are involuntarily unemployed. Div.Br. at 14. This Court's statement in *Goldberg, supra,* 397 U.S. at 265 in a welfare context applies equally well to the wrongful termination of unemployment compensation:

> The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

The summary termination of benefits hinders an eligible recipient in appealing his termination, and thus runs counterproductive to the Division's interest in insuring the payment of benefits to all eligible unemployed workers. Funds are necessary to enable the recipient to contact witnesses, gather evidence, and possibly retain counsel to represent him at the hearing. *Cf.* Note, *Withdrawal of Public Assistance: The Right to a Prior Hearing,* 76 YALE L.J. 1234 (1967). As was again pointed out in *Goldberg, supra,* 402 U.S. at 264:

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79. *See* nn. 5 and 71, *supra.*

80. *See* ANNUAL REPORT at 1, 7.

> [A recipient's] need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from . . . bureaucracy.[81]

The Court in *Goldberg* further recognized that the wrongful termination of welfare benefits breeds "societal malaise that may flow from a widespread sense of unjustified frustration and insecurity." 397 U.S. at 265. This is even more true in the case of unemployment compensation, which has always been considered a worker's earned "contractual right." *See Java, supra,* 402 U.S. at 131; Div.Br. at 14.

The Division suggests that prior evidentiary hearings will result in "complete chaos," Div.Br. at 19, and the Indiana employers predict a deluge of appeals resulting in the "wholesale abuse of the appeal process." Employer Br. at 11. The facts prove otherwise. The lower court's order has been in effect since October 27, 1971, and it has been complied with in a workable and efficient manner. Should the Division now wish to terminate a recipient, it merely affords him the opportunity to have benefit payments continued pending the Referee hearing already provided by statute which contains the due process elements specified in *Goldberg*. No fury of appeals has ensued; to the contrary, there has been an 8% *decrease* in the number of appeals requested by recipients. *Compare* U.S. DEPARTMENT OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Jan-Mar. 1972, Table 18 at 10 (May 1972) (764 appeals) with U.S. DEPARTMENT OF LABOR, MAN-

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81. Since the lower court's decision, the percentage of successful recipient appeals has increased. *Compare* U.S. DEPARTMENT OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Jan-Mar 1972, Table 18 at 10 (May 1972) (49.2% reversal rate) with U.S. DEPARTMENT OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Jan-Mar, 1971, Table 18 at 14 (June 1971) (45.7% reversal rate).

POWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Jan-Mar. 1971, Table 18 at 14 (June, 1971) (829 appeals).

Contrary to the assertions of amicus employers and California (EmployerBr. at 11, Cal.Br. at 2), the cost of holding prior evidentiary hearings is in no way prohibitive. Indeed, when compared to the *surplus* in the Employment Security Fund, the cost entailed by such due process hearings is .06%, a truly *de minimis* proportion.[82]

The Division's suggestion that the lower court's injunction requiring a "prior due process hearing" is "so vague as to be unenforceable" (Div.Br. at 16) is likewise erroneous. Throughout this litigation, all parties have treated the phrase "prior due process hearing" as meaning an evidentiary hearing containing the "rudimentary" procedures specified in *Goldberg*. The Division adopted this construction in complying with the lower court's order. In its transmittal letter directing compliance with the injunction, the Division stated:

> Effective immediately our procedures are being changed to comply with the Burney case. If a deputy arrives at a conclusion after a recorded fact finding interview, that a claimant's benefits should be termin-

82. In 1971, for example, 1474 claimants lost appeals before Division Referees. U.S. DEPARTMENT OF LABOR, MANPOWER ADMINISTRATION, UNEMPLOYMENT INSURANCE STATISTICS, Table 18a at 14 (May, 1972). Since many of these claimants were appealing from determinations denying initial eligibility, under the lower court's order they would not have been paid benefits pending a Referee hearing. However, even if all 1474 claimants were continued eligibility recipients and were paid benefits pending their Referee hearing, and if each of them received the maximum benefit of $45 for eleven weeks (the average period of continued eligibility, *see* ANNUAL REPORT at 55), the total amount of benefits paid would have been $729,630 ($45 x 11 weeks x 1474 claimants = $729,630). However, since 72% of all overpayments were recouped, the total unrecovered amount would have been $204,296. When this sum is compared with the surplus of $310,220,000.00 in the Employment Security Fund on December 31, 1971, *see* ANNUAL REPORT at 26, the resulting loss to the Fund would have been a mere .06%.

> ated, withheld, suspended, or reduced, for any reason other than earnings, after he has been determined eligible and paid benefits, the deputy will make a determination. . . . He will explain to the claimant that: (1) the matter will be referred to a referee for a due process hearing, and he, the claimant, will be advised of the date, time and location of the hearing, which he will be expected to attend, (2) that if the claimant does not wish to have a due process hearing, he may sign . . . a waiver of the hearing. In the event of (1) above, the deputy will prepare the appeal file in the normal manner and will not defer payments, explaining to the claimant that he will owe a refund if the decision of the referee is unfavorable.

Indiana Employment Security Division, Claims Manual Transmittal Letter No. 430. The Indiana Legislature has adopted a similar construction of the phrase "due process hearing." Indeed, the Legislature utilized the very phrase "due process hearing" in providing for the continuation of benefits to an employee pending a Referee hearing on an employer's appeal. IND. ANN. STAT. § 52-1542a(e) (Burns 1964 Repl., 1972 Supp.).

B

THE DIVISION'S ARGUMENTS FOR DISTINGUISHING GOLDBERG V. KELLY ARE INVALID.

1. Following the Initial Eligibility Determination, Both Unemployment and Welfare Recipients Occupy an Identical Eligibility Status.

The Division argues that *Goldberg* is inapplicable because of an alleged distinction between the "weekly" eligibility of unemployment compensation recipients and the "continued eligibility" of welfare recipients. Div.Br. at 15. To support this distinction, it contends "that affirmative duties are placed upon recipients of unemployment compensation benefits that are not placed on recipients in welfare programs." Div.Br. at 13. No such distinctions may properly be drawn.

The procedures used to award continuing benefits in the welfare and unemployment programs do not differ significantly. In both programs, recipients begin receiving regular benefits after an initial eligibility investigation, and thereafter are required to make periodic reports concerning their continued eligibility. An unemployment compensation recipient who has been found initially eligible for benefits is placed by the Division in a "continued claim" category and must report for an "interview" to review his status only once every five or ten weeks. MANUAL §§ 13725, 13727.[83] Welfare recipients likewise undergo periodic eligibility reviews, and are further responsible for immediately notifying the welfare department of any change of circumstances which may affect continued eligibility, including changes in living arrangements, income, property, composition of the household, or the school status of their children. INDIANA PUBLIC ASSISTANCE MANUAL, Chapter XI-A-1 and 2. Should questions arise concerning their continued eligibility, both unemployment compensation and welfare recipients are liable to have their benefits suspended indefinitely.[84]

Recipients in both programs must perform regular affirmative duties to maintain their continued eligibility. Unemployment compensation recipients must, for example, seek work, be available for work and report any change in work status or income. IND. ANN. STAT. § 52-1538b (Burns 1964 Repl. 1972 Supp.); § 52-1540 (Burns 1964 Repl.). All able bodied welfare recipients, except those having children under the age of six, are required to register for work, seek

83. To receive his check, an unemployment compensation recipient must also turn in a weekly payment voucher. MANUAL §§ 13600, 13610, 13620. In some instances, the voucher can be "executed" by mail. MANUAL § 13628. *See* n. 24, *supra*.

84. *See* note 25, *supra*.

and accept work, or, if unsuited for work, undergo job training, and report any change in status or income.[85]

The identical distinction betwen welfare and unemployment benefits urged by the Division in this case was emphatically rejected in *Crow v. California Department of Human Resources Development*, 325 F.Supp. 1314 (N.D. Cal. 1970). Holding that under *Goldberg v. Kelly, supra*, unemployment benefits may not be terminated without a prior evidentiary hearing, the court stated:

> Welfare and unemployment compensation schemes both involve an initial decision re eligibility, followed by periodic determinations that the applicant's circumstances have not changed in such a way as to affect that first decision.

325 F.Supp. at 1319.

Whatever the labels, the duties, procedures, and requirements for continued eligibility in the unemployment compensation system closely resemble those in the welfare program. Surely the decision in *Goldberg* did not turn on labels. If the welfare department therein had employed identical procedures, but simply had used a different terminology,

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85. *See* Sec. 3 of the 1971 Amendments to Social Security Act, 1971 *Cong. and Admin. News* pp. 3966 *et seq.*; 37 *Fed. Reg.* 12204 (1972); IND. ANN. STAT. § 52-1241a (Burns 1964 Repl., 1972 Supp.); 4 IND. ADMIN. RULES & REGS. § (52-1244)-2 (Burns 1967, 1972 Supp.); IND. PUBLIC ASSISTANCE MANUAL, Chap. III-C-15, IV-B-21, XI-A-1 and 2.

In addition, in those states participating in the AFDC-U program (*see* note 45, *supra*), the "affirmative duties" of the AFDC-U recipient are more stringent than those required of the unemployment recipient. Not only must an AFDC-U recipient be available for and seeking employment, *see, e.g.* CAL. WELF. & INS. CODE § 11201 (West Supp. 1972), he also may not turn down any bona fide offer of employment without "good cause", regardless of its "suitability" 42 U.S.C. § 607(b)(1)(B).

In Goldberg v. Kelly, *supra*, plaintiff Lett's welfare benefits were specifically terminated for allegedly failing to report her current employment to the Department. *See* Kelly v. Wyman, 294 F.Supp. 893, 899-900 (S.D.N.Y. 1968) (three-judge court).

calling its periodic review of continued eligibility a "new eligibility determination" the result would not have been different. As this Court stated in *Bell v. Burson,* 402 U.S. 535, 541 (1971), "in reviewing state action in this area [of procedural due procees] . . . we look to substance, not to form, to determine whether constitutional minimums have been honored."

2. Holding an Evidentiary Hearing Prior to the Termination of Unemployment Benefits Does Not Affect Any Significant Employer Interests.

Indiana employers assert that their rights will be adversely affected by the payment of benefits pending an evidentiary hearing. Petition to File Amicus Brief at 3-4. This contention is wholly specious. Under the "experience rating" system, the amount of taxes assessed against an employer under the Employment Security Act does vary with the number of his former employees who are properly paid unemployment benefits. But should a former employee be found ineligible for benefits at a Referee hearing or an any subsequent stage, the employer's account is relieved of all charges for benefits improperly paid. IND. ANN. STAT. § 52-1537(d) (Burns 1964 Repl., 1972 Supp.). Thus, regardless of whether an employee is paid benefits pending an evidentiary hearing, his former employer suffers no monetary loss if the employee is ultimately determined to be ineligible. As Mr. Justice Douglas noted in his concurring opinion in *Java, supra,* 402 U.S. at 136:

> . . . an employer's account is not finally charged with benefit payments until after he has exhausted all appeals in the administrative chain and also obtained judicial review. If he wins at any appellate level, he is *not* charged with any benefits paid to his employee . . . . He has *no* responsibility for recoupment.

Any unrecouped overpayments resulting from the payment of benefits pending an evidentiary hearing to recipi-

ents eventually found to be ineligible are charged against the general Employment Security Fund, for which all of the state's thousands of employers are taxed on an equal basis.[86] The employer's financial interest in the general Fund is identical to that of any other category of taxpayers composed of less than the general public, such as homeowners paying property taxes or automobile owners paying automobile registration taxes. As this Court pointed out in *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 364 (1951):

> Payments of unemployment compensation were not made to the employees by respondent [his former employer] but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state.

Moreover, considering the *de minimis* effect on the state's Employment Security Fund (.06%)[87] of the payment of benefits pending an evidentiary hearing, any concern about a possible future tax increase is entirely speculative.

Further as businessmen and citizens, the state's employers have an interest in assuring the payment of unemployment benefits to all eligible unemployed workers during

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86. "Even though the employers in the first instance pay the contribution . . . in the ultimate analysis it tends to rest upon the wage earner." Statement of Alvin H. Hansen, Chairman of Sub-Committee on Unemployment Insurance, Committee on Economic Security, *Hearings on S. 1130 Before the Sen. Comm. on Finance* 74th Cong. 1st Sess. 447 (1935); *see* dialogue between Senator (later Mr. Justice) Black and Senator Wagner, *id.* at 25; dialogue between Senator Black and Frances Perkins, *id.* at 117-18; Note, *Charity versus Social Insurance In Unemployment Compensation Laws*, 73 YALE L.J. 357, 361 (1963).

87. *See* n. 82, *supra*.

the "limited period" in which Congress intended benefits to be paid[88] Employer Br. at A9. Thus, like the Division, the employers interests are advanced by a pre-termination evidentiary hearing.

3. The Use of the Initial Eligibility "Informal Interview" to Terminate Unemployment Benefits Violates Due Process.

Notwithstanding the fact that the Division's procedure for determining *initial* eligibility lacks such *Goldberg* due process ingredients as timely and adequate notice, confrontation and cross-examination, an impartial decision-maker and a decision based solely on the legal rules and evidence adduced at the hearing, *see Goldberg, supra,* 397 U.S. at 267-71, the Division urges that this procedure may properly be used for *terminating* a recipient's continued unemployment eligibility. Div. Br. at 17-18. In so doing, the Division ignores the fact that a recipient of government benefits who has been certified as being initially eligible acquires greater procedural protections than an initial applicant whose statutory eligibility has never been official established. *Cf. Perry v. Sinderman,* .... U.S. ...., ..., 92 S.Ct. 2694, 2699 (1972); *Board of Regents v. Roth,* .... U.S. ...., ..., 92 S.Ct. 2701, 2708 (1972). Merely because a procedure suffices to establish initial eligibility, it does not follow *a fortiori* that it is constitutionally adequate to divest a recipient of a statutory entitlement that he previously has been enjoying. Indeed, the essence of the holding in *Goldberg v. Kelly,* 397 U.S. 254 (1970), is that a procedure used by welfare departments to establish initial eligibility violates due process when used to terminate a welfare recipient's continued eligibility.

The Court's decision in *California Department of Human Resources Development v. Java,* 402 U.S. 121 (1971) that

88. Unemployment compensation was designed to stabilize the labor market and protect purchasing power—two distinct employer concerns. *See* Sections I-A-2b & c of this Brief, *supra.*

unemployment benefits may not be summarily suspended pending an employer's appeal in no way supports the use of the Division's initial eligibility "informal interview" to terminate continued unemployment benefits. *Java* dealt only with the process for establishing *initial* eligibility, not with the procedures required to terminate the continued receipt of benefits.

Indeed, while *Java* did not reach the due process issue,[89] the Court's opinion strongly suggests that due process requires an evidentiary hearing prior to the termination of unemployment benefits. In deciding the case on statutory grounds, the Court reviewed the issue of need in connection with the purposes of unemployment compensation, pointed out the "obvious" "importance of this case to workers,"[90] and stated:

> A kind of need is present in the statutory scheme for [unemployment] insurance . . . . since unemployment benefits provide cash to a newly unemployed worker "at a time when otherwise he would have nothing to spend" serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity.

Java, supra, 402 U.S. at 130-32.[91] Thus, *Java* not only fails to uphold the "informal interview" as a means of terminating unemployment benefits, it strongly suggests that such terminations fall within the purview of *Goldberg v. Kelly, supra.*

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89. *But see* California Department of Human Resources Development v. Java, *supra,* 402 U.S. at 136 (Douglas, J.) (concurring opinion).

90. 402 U.S. at 125.

91. *See also* concurring opinion of Mr. Justice Douglas, Java, *supra,* 402 U.S. at 136. In holding that the termination of unemployment benefits prior to an evidentiary hearing violated both due process and the Social Security Act, the three-judge district court in Java had stated:

CONCLUSION

In his concurring opinion in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), Mr. Justice Harlan pointed out that "notice and a prior hearing" are "the *usual* requisites of procedural due process." 395 U.S. at 342 (emphasis added). In *Goldberg, supra,* a prior evidentiary hearing was recognized as essential to protect welfare recipients from the arbitrary termination of benefits. While unemployment compensation and welfare bear striking resemblance to one another, Congress saw one basic distinction: Unlike welfare,[92] unemployment compensation was considered a worker's earned "contractual right"[93] to benefits which his labor helped to create.[94] In providing "subsistence" benefits to a worker "at a time when otherwise he would have nothing to spend,"[95] unemployment compensation serves the same purpose for the involuntarily unemployed as welfare serves for its beneficiaries. Surely due process and the Social Security Act provide unemployed workers with no

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> Defendants herein suggest that the unemployed person is perhaps not in such dire straits as the recipient of public assistance, in that he can always go on welfare, and thus save himself from absolute destitution. It is scant comfort to the disaster-stricken that there is someone, somewhere worse off than he, and this Court finds that the situation of the unemployed person herein is every bit as lamentable from the legal standpoint as that of the welfare client in Kelly v. Wyman and the garnishee in Sniadach v. Family Finance Corp. . . . [citation omitted].

317 F.Supp. 875, 878 (N.D. Cal. 1970).

92. Prior to Goldberg, welfare benefits were often considered to be a "gratuity." *See* Goldberg v. Kelly, 397 U.S. 254, 261 n.8; *cf. id.* at 271 (Black, J.) (dissenting opinion).

93. Java, *supra,* 402 U.S. at 131-32; REPORT TO THE PRESIDENT OF THE COMMITTEE ON ECONOMIC SECURITY 13 (1935).

94. *See* n. 86, *supra.*

95. Java, *supra,* 402 U.S. at 131-32.

less procedural protection than their counterparts in the public assistance programs.

The judgment below should be affirmed.

Dated: September 22, 1972.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1972

No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, *et al.*,
Appellants,

v.

ESSIE B. BURNEY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief *amicus* in the instant case in support of the position of the Appellees, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the Appellees has been obtained. Counsel for the Appellants have refused their consent.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 115 national and international unions having a total membership of approximately 13,500,000 working men and women.

Unemployment compensation was designed to protect "industrial workers ordinarily employed." Report To The

President Of The Committee On Economic Security, 13 (1935). That, of course, is an accurate description of the great majority of the members of the Federation's affiliates. The fact that the instant case promises to have a substantial impact on the manner in which unemployment compensation is administered, is, therefore, more than sufficient cause for the AFL-CIO to be vitally concerned as to its outcome. But in this instance the practical importance of the question does not exhaust organized labor's interest in the proceeding. For Indiana's summary suspension of benefits procedure is not based on a valid neutral principle—it is based on the principle that the entire costs of litigation delay incident to the resolution of a disputed question of continued eligibility for benefits shall be borne by the unemployed. Thus, it discriminates against workers, as a class, thereby distorting the basic protective purposes of the unemployment compensation law. This being so, the Federation's interest in presenting its views to this Court is self-evident.

THE ISSUE TO BE COVERED IN THE AFL-CIO'S BRIEF AMICUS

The Appellees have structured their argument in a manner which creates a dichotomy between the statutory, and Due Process clause, arguments presented, and which places primary emphasis on the latter. It is our view that this case turns on the statutory questions involved and that the cases delineating the content of due process are principally relevant only insofar as they provide the context for ascertaining Congress's intent in including § 503 (a)(3), which requires the States to provide "fair hearings" to unem-

ployment compensation recipients, in the Social Security Act, 42 U.S.C. § 503 (a)(3). The argument developed in the accompanying brief *amicus* reflects this orientation.

CONCLUSION

For the above-stated reasons, we respectfully urge the Court to grant this motion to file the accompanying brief *amicus* in the instant case in support of the position of the Appellees.

Respectfully submitted,

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September, 1972

Supreme Court of the United States

October Term, 1972

No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, *et al.*,
Appellants,

v.

ESSIE B. BURNEY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This *amicus* brief is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae.*

The interest of the AFL-CIO is set out on pp. iii-iv of the foregoing motion for leave to file a brief as *amicus curiae.*

ARGUMENT

1. The instant case involves the rights of workers "who have been or will be determined by [a State] to be eligible for unemployment compensation benefits, and who have had or will have such benefits terminated, withheld, suspended, or reduced without a prior, due process hearing." J.S. A-9. In other words, it involves the rights of recipients of unemployment compensation who have been found initially eligible for benefits pursuant to a procedure exactly parallel to

that followed by California and described in this Court's opinion in *California Human Resources Dept.* v. *Java*, 402 U.S. 121. Compare J.S. A-2, A-6—A-7 with 402 U.S. at 126-128. This "initial determination of an employee's status as an insured worker and the deputy or referee's initial determination of eligibility" is, as the District Court found, "the critical point in the Indiana procedure" (J.S. A-7) for administering unemployment compensation. Compare *Java*, 402 U.S. at 127-128.

Two interrelated preliminary points are therefore plain. First, contrary to Indiana's contention (Ind. Br. p. 13), this case has nothing to do with the rights of claimants who have not been found initially eligible. The Appellees do not argue, and neither do we, that those who have not established their initial eligibility are entitled to any particular type of a hearing, or to the payment of compensation while the State is considering their case. The range of the State's powers in screening those it will place on the unemployment compensation rolls is not at issue.

Second, those who have been found initially eligible to receive unemployment compensation, like those who have been found initially eligible to receive welfare, are subject to certain conditions subsequent which qualify their statutory entitlement to continued benefits. Both welfare and unemployment compensation recipients must perform regular affirmative duties to maintain their continued eligibility. Unemployment compensation recipients must, for example, seek work, be available for work and report any change in work status or income.[1] All able bodied welfare

[1] Ind. Ann. Stat. § 52-1538B (Burns 1964 Repl. 1972 Supp.) § 52-1540 (Burns 1964 Repl.).

recipients, except those having children under the age of six, are required to register for work, seek and accept work, or, if unsuited for work, undergo job training, and report any change in status or income.[2] In both programs, beneficiaries begin receiving regular benefits after an initial eligibility investigation, and thereafter are required to make periodic reports concerning their continued eligibility. An unemployment compensation recipient who has established his status as an "insured worker"[3] is placed in a "continued claim" category and must report for an "interview" to review his status once every five or ten weeks.[4] Welfare recipients also undergo periodic eligibility reviews.[5]

Thus the States have adopted administrative interview procedures which admittedly do not meet the essential rudiments of due process (App. 26 ¶ 16) to ascertain whether the specified conditions of continued eligibility are met by those receiving benefits. There is no challenge here to the States right to take this step, and on the basis of an adverse administrative determination, to terminate benefits immediately where the recipient accepts that determination.

What is at stake is whether the States must grant an unemployment compensation recipient, who maintains that he has met the statutory conditions for continued benefits,

[2] Ind. Ann. Stat. § 52-1241a (Burns 1964 Repl., 1972 Supp.); 4 Ind. Admin. Rules & Regs. § 52-1244-2 (Burns 1967 Repl., 1972 Supp.); Ind. Pubic Assistance Manual, Chap. 111-C-15, IV-B-21, XI-A-1 and 2.

[3] Ind. Ann. Stat. § 52-1526X (Burns, 1964 Repl.).

[4] Ind. Employment Security Division, Unemployment Claims Manual §§ 13720-13732.

[5] Ind. Public Assistance Manual, Chapter XI-A-1 and 2.

and who requests an opportunity to demonstrate his continued eligibility, a "full evidentiary" hearing (Ind. Br. p. 16) *prior* to any deprivation of benefits. Thus the question here is precisely the question decided in favor of welfare recipients in *Goldberg* v. *Kelly,* 397 U.S. 254.[6] It only beclouds analysis to state, as Indiana does, that the decision to terminate the benefits of one already on the unemployment rolls is really an "initial [eligibility] determination" (Ind. Br. p. 13) since "eligibility is determined on a week-by-week basis" (Ind. Br. p. 7), and that the situation of the Appellees here is comparable to that faced by individuals who have never demonstrated their initial eligibility. For this formula of words can not disguise the fact that these determinations deal with precisely the same type of continued eligibility issues which this Court in *Goldberg* (397 U.S. at 266-271) stated should be determined in a "full evidentiary" hearing. As the court below properly found "the concept of when benefits are due under the Social Security Act does not change from week to week after a claimant has been found [initially] eligible." J.S. A-9. Claimants who have already established their status as an "insured worker" have made out a *prima facie* case that they have a statutory entitlement to unemployment compensation. They have therefore established a sufficient probability that "they [are], in fact, within the statutory terms of eligibility" to have "a right to a hearing at which they [may] attempt to" demonstrate their continued eligibility. *Board of Regents* v. *Roth,* .....

[6] "The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing *before* the termination of benefits." 397 U.S. at 260.

U.S. ....., 40 L. W. 5079, 5083. In contrast an individual who claims the right to benefits but has not proved his initial eligibility as an "insured worker" can not be differentiated in any meaningful way from any other individual in the society. His demand for a hearing therefore lacks a proper predicate. It is for this reason that he is not entitled to the same procedural protections due those who have received official recognition of their basic right to benefits.

Additionally, it should be noted that it is common ground that the "fair hearing" provision of the Social Security Act, 42 U.S.C. § 503(a)(3) requires a "full evidentiary" hearing (Ind. Br. p. 16); viz., a hearing "conducted in accordance with procedural safeguards" which meet the "essential requisites of fairness" delineated by the "case law,"[7] before an unemployment compensation recipient can be finally deprived of his statutory entitlement. For this "Court has held that a person receiving welfare bene-

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[7] U.S. Department of Labor Unemployment Insurance Services Office of State Operations, Guide To Unemployment Insurance Benefits Appeals: Principles And Procedures, 2-3 (1970), which states:

> "Hearings must be fair, and they must therefore be conducted in accordance with procedural safeguards. The essential requisites of fairness, although expressed in many ways, include the following elements which have been excerpted from case law: "timely notice to all claimants of every material step in the proceedings; . . . to hear the evidence against him and to know the claims of his opponent; . . . to cross-examine witnesses; . . . that the Decision of the Board shall be governed by and based upon the evidence produced at the hearing. . . ."

See also *Goldberg* v. *Kelly*, 397 U.S. at 266-271.

fits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. Goldberg v. Kelly, 397 U.S. 254." *Roth*, 40 L.W. at 5083. And the " 'property' interests protected by procedural due process" include the full range of "claim[s] of entitlement • • • grounded in [a] statute defining eligibility for them." *Ibid.* "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Id.* at 5082. Thus as this Court squarely held in *Sherbert* v. *Verner*, 374 U.S. 398, 405, unemployment compensation benefits, no less than welfare[8] or social security[9] benefits "fall within the protection from arbitrary governmental action afforded by the Due Process Clause." And as the Court stated in *Fuentes* v. *Shevin*, ... U.S. ....., 40 L.W. 4692, 4696:

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard'; • • • Baldwin v. Hale, 68 U.S. 223.
>
> • • •
>
> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property • • •"

[8] *Goldberg* v. *Kelly*, 397 U.S. 254.

[9] *Flemming* v. *Nestor*, 363 U.S. 603.

Thus, this is not a case like *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, where there is a substantial dispute as to whether a hearing is required at all; if litigation delay were not a fact of life there would be no controversy between the parties here. But delay in the resolution, through a "full evidentiary" hearing, of challenges to the right of an individual, already found eligible for unemployment compensation, to continued enjoyment of his statutory entitlement, is the norm. In Indiana, where the average length of time an unemployed worker receives benefits is 11 weeks, during the period January-March, 1972, 63% of those who sought a full hearing did not receive a determination within 11 weeks, and during 1971, 72% did not receive a determination within 11 weeks.[10]

Indiana's response to the fact of delay has been to authorize summary suspension of benefits (J.S. A-7—A-8), thereby placing the full costs of delay on the recipients whose continued entitlement to benefits is questioned. This response, we submit, does not meet the requirements of federal law. The Social Security Act read in conjunction with the Due Process Clause creates an all but unrebuttable presumption, which has not been overcome here, against a procedure pursuant to which a State deprives unemployment compensation recipients, who have been found initially eligible by the State, and who insist that they have complied with the conditions for continued eligibility, of their prop-

[10] Thirty-sixth Annual Report of the Indiana Employment Security Board, Employment Security in Indiana 1971, p. 55 (March 30, 1972); U.S. Dept. of Labor, Manpower Administration, Unemployment Insurance Statistics, Table 17a, p. 12 (March, 1972); U.S. Dept. of Labor, Manpower Administration, Unemployment Insurance Statistics, Table 17 at p. 9 (May, 1972).

erty right in their benefits prior to a finding of ineligibility made in a "full evidentiary" hearing.

2. (a) In providing for a system of unemployment compensation

> "the congressional objective [was to get] money into the pocket of the unemployed worker at the earliest point that is administratively feasible. That is what the Unemployment Insurance program was all about." *Java*, 402 U.S. at 135.

The Congressional aim was to approach, as nearly as was possible, the ideal of making "insurance payments available precisely on the nearest payday following the termination." *Id* at 130. For:

> "The purpose of the Act was to give prompt if only partial replacement of wages to the unemployed, to enable workers 'to tide themselves over, until they get back to their old work or find other employment, without having to resort to relief.' Unemployment benefits provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity. Further, providing for 'security during the period following unemployment' was thought to be a means of assisting a worker to find substantially equivalent employment. • • • Finally, Congress viewed unemployment insurance payments as a means of exerting an influence upon the stabilization of industry. • • • 'Early payment of insurance benefits serves to prevent a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services.' *Id.* at 132-133, footnotes omitted.

The States are therefore mandated by § 303(a)(1) of the

Act, which requires that state methods of administration must "be reasonably calculated to insure full payment of unemployment compensation when due" to begin "paying compensation to an unemployed worker promptly after an initial determination of eligibility" (*id.* at 133). For this "accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes." *Ibid.*

But the Indiana procedure challenged here does not provide for the payment of "compensation to an unemployed worker promptly after an initial determination of eligibility" where a disputed question concerning his compliance with the conditions for continued eligibility arises. In such cases payments are summarily suspended pending a "full evidentiary" hearing. When those hearings are held the latest figures show that 49.2% of the decisions are in favor of the claimants.[11] But as noted above, despite the fact that the average time on Indiana's unemployment compensation rolls is 11 weeks, between 63% and 72% of those who request a full hearing must wait over 11 weeks for a decision. To be sure, vindication of the rights of unemployment compensation recipients who are in fact entitled to benefits after "months have elapsed" serves the cause of abstract justice. As this Court squarely recognized in *Java* (402 U.S. at 133), however, a system which normally suspends payments "after an initial determination of eligibility" for a period equal to the average time on the unemployment

[11] U.S. Dept. of Labor, Manpower Administration, Unemployment Insurances Statistics, Table 18, p. 10 (May 1972).

compensation rolls does not "accomplish" the Congressional "purposes" underlying the Act; instead it "defeats" them.[12] Thus summary suspensions of benefits are plainly in contravention of §§ 303(a)(1) and 303(a)(3) of the Act unless it can be shown that no other system of dealing with disputes concerning continued eligibility is "administratively feasible" (*id* at 135).

(b) It is perfectly well settled that in determining the content of procedural regulations such as §§ 303(a)(1) and 303(a)(3) of the Act, the Courts look to the context provided by the decisions elaborating the elementary notions of fair procedure contained in the Due Process Clause, as well as to the language, purpose and legislative history of the statutes in question:

> "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. • • • These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." *Greene* v. *McElroy*, 360 U.S. 474, 507-508.

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[12] "It seems clear therefore that the California procedure, which suspends payments for a median period of seven to 10 weeks pending appeal, after an initial determination of eligibility has been made, is not 'reasonably calculated to insure full payment of unemployment compensation when due.'[18]

• • •

"[18] It was uncontested in argument before the District Court that the average period of unemployment in California is approximately nine weeks." 402 U.S. at 133.

And the due process decisions reinforce the conclusion, manifest in the Act itself, that the summary suspension of unemployment compensation benefits where a question of continued eligibility has arisen is presumptively unlawful. The basic constitutional principles regarding the right to a prior hearing where continued enjoyment of a property interest is at stake are set forth in full in *Fuentes,* 40 L.W. at 4696-4697, this Court's most recent statement on the issue:

> "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if it was unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' Stanley v Illinois, — US —, —.
>
> "This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing 'appropriate to the nature of the case,' Mullane v Central Hanover Tr. Co., 339 US 306, 313, and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any],' Boddie v Connecticut, 401 US 371, 378, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the depriva-

tion at issue takes effect * * *

> 'That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' Boddie v Conecticut, supra, at 378-379 (emphasis in original).' "

In short the ultimate question here, phrased in the language of *Java,* is whether summary suspension of unemployment compensation benefits, where there is a disputed question of continued eligibility, is the only "administratively feasible" course; and phrased in the language of the due process decisions, it is whether this is an "emergency situation" (*Bell* v. *Burson,* 402 U.S. 535, 543) which "justifies postponing the hearing until after the event" (*Boddie* v. *Connecticut,* 401 U.S. 371, 379). Thus in substance the issue presented is whether the interests of Indiana in a summary procedure substantially outweigh the interests which have led this Court to conclude that prior hearings are the all but invariable norm.

3. No significant governmental interest supports Indiana's summary suspension procedure. First, there can be no doubt that this procedure is not necessary to safeguard the solvency of the unemployment compensation fund. If the claimant prevails at his "full evidentiary" hearing the prompt regular payments already made to him as an eligible beneficiary have achieved the precise aim of the Act.

Java, 402 U.S. at 133. And the position of the claimant is upheld in nearly half of the cases heard (p. 9 *supra*). Moreover, the data available for the last full year of operations, 1971, indicates that the estimated loss resulting from the payments pending a hearing made in the remaining cases would be approximately $204,296 or .06% of the Indiana Fund's $310,220,000 reserve.[13] In 1971, 1474 claimants received an adverse determination after a full hearing.[14] If, their benefits had been paid pending their hearing, and if each of the 1474 claimants had received $45 for 11 weeks,[15] the total overpayment attributable to payments pending a hearing would have been $729,630. However, since Indiana recouped 72% of its overpayments,[16] the total unrecovered amount would have been $204,296.[17]

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[13] Thirty-sixth Annual Report of the Indiana Employment Security Board, Empoyment Security in Indiana, 1971, p. 27 (March 30, 1972).

[14] U.S. Department of Labor, Unemployment Insurance Statistics, Table 18, p. 10 (May, 1972).

[15] $45 is the maximum benefit paid and 11 weeks is the average period on the unemployment compensation rolls.

[16] Indiana Employment Security Board Annual Report, p. 34.

[17] It should be noted that this figure is based on the assumption that Indiana would not avail itself of available methods to limit overpayments other than its summary suspension procedure. If, for example, the State increased the number of Hearing Referees who conduct full hearings, it could markedly reduce the present unreasonably long period required for the issuance of referee's decisions. Administrative costs are reimbursed by the federal government and may not be drawn from the Employment Security Fund, 42 U.S.C. §§ 503(a) and 1103(c) (1). Thus the hiring of additional Referees would have no effect on the amount of money available for the payment of benefits.

Second, the District Court's order requiring Indiana to conduct a full hearing prior to suspension or termination of benefits was entered on October 27, 1971. Pursuant to that order the State still makes administrative determinations as to whether the conditions for continued eligibility have been met. When it concludes that they have not, it affords the recipient the opportunity to have his benefit payments continued if he wishes a "full evidentiary" hearing. Experience demonstrates that this requirement has not added to the State's administrative burdens. Comparing the period January-March 1971 and January-March 1972, there has been an 8% *decrease* (from 829 requests to 764) in the number of claimants seeking a hearing.[18] Moreover, utilizing the same periods of comparison, the percentage of hearings at which the claimants prevail has *increased* since the District Court's order went into effect.[19]

Third, here, as in *Jáva,* summary suspension of benefits can not be justified by invoking the interests of the employers who pay taxes into the Fund. Assuming *arguendo* that the employers interest in the lowest possible tax rate is a legally protected interest (but see *N.L.R.B.* v. *Gullet Gin Co.* 340 U.S. 361), the cost estimates just noted (pp. 12-13 *supra*), are sufficient to demonstrate that providing full

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[18] Compare U.S. Department of Labor, Unemployment Insurance Statistics, Jan.-Mar. 1972, Table 18, p. 10 (May 1972) with U.S. Department of Labor, Unemployment Insurance Statistics, Jan.-March 1971, Table 18, p. 14.

[19] Compare U.S. Department of Labor, Unemployment Insurance Statistics, Jan.-Mar. 1972, Table 18, p. 10 (May 1972) (49.2% success factor) with U.S. Department of Labor, Unemployment Insurance Statistics, Jan.-Mar. 1971, Table 18, p. 14 (June, 1971) (45% success factor).

hearings before the termination of benefits will not cause an increase in the overall tax rate. And, in Indiana, as in California (see *Java*, 402 U.S. at 135-136) the status of the individual employer whose former employee receives an erroneous overpayment pending a hearing is completely safeguarded. The amount of taxes paid by an employer into the Employment Security Fund varies with the number of his former employees who qualify for unemployment benefits. But, should a former employee be found ineligible for benefits at a referee hearing or at any subsequent stage, the employer's account is relieved of all charges.[20] The State, not the employer, bears sole responsibility for recoupment of overpayments. Thus even if an employee receives an overpayment pending an evidentiary hearing, his former employer suffers no monetary loss.

It is plain, therefore, that there is no substance in the contention (Ind. Br. p. 13) that summary suspension is the primary means of protection against unfairness to employers, administrative chaos, and improvident depletion of the Fund which will force tax increases. The sole cost of providing pretermination hearings is a modest marginal rise in overpayments of approximately $204,000 per year or .06% of the Fund's reserves. This loss is of the same order of magnitude as that projected for the procedural reform ordered by this Court in *Java*. There the cost of halting summary suspensions of benefits pending an employer's appeal from a ruling of initial eligibility was approximately $350,000 per year or .03% of the California Fund's re-

[20] Ind. Ann. Stat. § 52-1537(d) (Burns 1964 Repl. 1972 Supp.).

serves.[21] Thus here as in *Java* the State has not shown that the costs of fulfilling Congress's primary goal—"paying compensation to an unemployed worker promptly after an initial determination of eligibility" (*Java* 402 U.S. at 133) — are sufficient to justify delaying compensation "until months have elapsed" (*ibid*).

Equally to the point, the rationale of the due process cases leaves no doubt that costs within this range are not sufficient to create an "emergency situation" (*Bell* v. *Burson*, 402 U.S. at 543) which "justifies postponing the hearing until after the event" (*Boddie* 401 U.S. at 379). In *Goldberg* v. *Kelly*, for example, where the costs of pretermination hearings were at least as great, and probably greater since the possibility of recoupment of erroneous overpayments from "judgment proof" welfare recipients (379 U.S. at 266) is more remote than from employable workers, the Court stated (*ibid*):

> "The interest of the eligible recipient in uninterrupted receipt of public assistance coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens."

And as Mr. Justice White added in *Stanley* v. *Illinois*, 405 U.S. 645, 656.:

> "[O]ne might fairly say of the Bill of Rights in general and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency which may characterize praiseworthy gov-

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[21] Brief for the AFL-CIO as amicus curiae in No. 507, Oct. Term, 1970, p. 8.

ernmental officials no less and perhaps more than mediocre one."

While the costs imposed on the States, and on employers, of a full hearing before the fact are *de minimis*, the costs of Indiana's summary suspension procedure on claimantss are unacceptably high. As noted above (p. 7, *supra*) in almost one case out of two, a summary termination of benefits serves to deprive a claimant, who is in fact eligible, of compensation at the point in time when the benefits will serve their intended purpose—"promptly after an initial determination of eligibility" (*Java*, 402 U.S. at 133). This Court has noted the weight of the burden imposed by such a loss of benefits. In *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239, Mr. Justice Black stated that the unemployed are "of modest means," have "heavy responsibilities," and risk "financial ruin" if there is a "severance of [the] sustaining funds" provided by compensation. The available statistical evidence demonstrates that this assessment is entirely correct.

The mean hourly wage of the rank and file worker as of July, 1972 was $3.62 an hour, i.e. approximately $7,000 to $7,500 a year.[22] Typically, that worker is the sole support of family of four.[23] The latest government estimate places a "lower" weekly budget to feed, shelter, clothe and provide

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[22] U.S. Dept. of Labor, Bureau of Labor Statistics, *Employment and Earnings*, Vol. 9, No. 2, p. 80, Table C2 (August, 1972).

[23] There are 39,303,000 families in the United States and 9,136,000 unrelated individuals. The average family has 3.54 members. Statistical Abstract of the United States 1970, p. 35, Table 40. In over 55% of families only one spouse is an income earner, U.S. Dept. of Commerce, Bureau of The Census, *Current Population Reports*, Series P-60, No. 75, p. 55, Table 24 (Dec. 14, 1970).

medical care for such a family at $111 a week.[24] But the median liquid assets of that family, available to meet an emergency which cuts off the flow of income, is $300.[25] The typical industrial worker therefore has funds to tide him over for less than three weeks of unemployment. And that is the period necessary to determine initial eligibility.[26] This means that by the time he is placed on the compensation rolls his funds are likely to be exhausted.

Thus, while there is no "means" test for unemployment compensation, today, as in 1935, for the "industrial workers ordinarily employed" (Report To The President Of The Committee On Economic Security at p. 13), who comprise the bulk of compensation beneficiaries

> "unemployment benefits provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of his turning to welfare or private charity." *Java,* 402 U.S. at 131-132, footnote omitted.

In short, in the instant case, as in *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 and *Goldberg* v. *Kelly,* the result of the States' summary procedure is to condemn the party deprived of his statutory entitlement or other property interest "to suffer grievous loss," (*Goldberg* 397 U.S. at 263). The typical unemployment compensation beneficiary occupies a position substantially worse than the

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[24] U.S. Dept. of Labor, Bureau of Labor Statistics, *Autumn 1971 Urban Family Budgets and Geographical Comparative Indexes,* Table A (April 27, 1972).

[25] Katona, *et al.,* Survey of Consumer Finances p. 100, Table 6-3 (1970).

[26] Unemployment Claims Manual § 13130.

driver who lost his license in *Bell* v. *Burson*, 402 U.S. 535, and the consumer whose goods were replevied in *Fuentes*, 40 LW 4692, somewhat worse than the garnished employee in *Sniadach*, and somewhat better than the welfare recipient in *Goldberg* whose benefits were summarily terminated. The consumer's and the driver's flow of income will normally remain unimpaired. The garnisheed employee, in addition to his liquid assets, has a continuing income in the form of a "subsistence allowance" of $25 to $50 to a week. *Snaidach*, 395 U.S. at 338 n. 1. The typical displaced industrial worker has median liquid assets of $300 but no continuing income. And the welfare recipient "lacks [all] independent resources." *Goldberg*, 397 U.S. at 264. But in terms of the applicable legal standard these are distinctions without a difference. For here as in *Snidach* the granting of interim relief "may impose tremendous hardship on wage earners with families to support," it "may as a practical matter drive a wage earning family to the wall" because the money available will "generally be insufficient to support [the unemployed worker] for any one week," (395 U.S. at 340, 241-342). Thus in the instant case no less than in *Goldberg* "termination of [benefits] pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits," (397 U.S. at 264, this Court's emphasis).

The sum of the matter is this: Indiana's summary suspension procedure contravenes the basic purpose of the unemployment compensation system—the "pay[ment of] compensation to an unemployed worker promptly after an initial determination of eligibility" (*Java*, 402 U.S. at 133.)"—and does so without serving an overriding com-

peting interest of the State. The court below therefore acted in conformity with this Court's decision in *Java*, and with the line of due process cases culminating in *Fuentes*, in requiring Indiana to grant a pre-termination "full evidentiary" hearing to an unemployment compensation recipient who has been found initially eligible for benefits and who maintains that he has met the statutory conditions for continued eligibility.

CONCLUSION

For the above stated reasons the judgment below should be affirmed.

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September, 1972

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, JOHN F. COPPES, individually and as Director of the Indiana Employment Security Division; VAN SMITH, MAX WRIGHT, and ALBERT SUMMERS, individually and as members of the Indiana Employment Security Board, KENNETH M. SWAIM, individually and as Manager of the Fort Wayne Branch of the Indiana Employment Security Division,

Appellants,

-vs-

ESSIE B. BURNEY,

Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

REPLY BRIEF

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Appellants,

-vs-

ESSIE B. BURNEY,

Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

REPLY BRIEF

STATEMENT OF THE CASE

The Statement of the case in the Brief of Appellants is accurate and reasonable. However, the Statement of the case in the Brief of Appellee is rejected in that it is argumentative and contains a number of inaccuracies.

STATE LAW AND PROCEDURE

It would appear that the major question in dispute in this case is not one of federal statutory or constitutional law, but rather the procedures used by the Division under Indiana law. The point in issue is whether eligibility is

determined weekly or whether an initial determination of eligibility is made which continues in effect over some future period. It is quite clear that eligibility is determined on a weekly basis.

Indiana law distinguishes between an initial determination of "insured status" and determinations of eligibility. In practice, those eligibility determinations are also spoken of as "initial" and "continued" claims. These terms must be considered.

The first determination is whether a claimant is an "insured worker." Indiana Code of 1971, 22-4-17-2(a), set out in the Brief of Appellants at p. A-1. An "insured worker" is one who has earned the required amount of wage credits. Indiana Code of 1971, 22-4-2-25. Such a determination is necessary because the unemployment compensation system is based in part on an insurance principle.

Section 22-4-17-2 does require calculation, as part of this determination, of "the maximum amount of benefits that may be paid to him for weeks in his benefit period." The practice is to calculate that amount into weekly benefits amounts and duration. *Unemployment Compensation Claims Manual*, § 13100. Such determination, though, establishes no right to benefits any more than the payment of a premium on a term life insurance policy allows the insured to collect the face value of the policy the next day. There are conditions precedent to payment. In the life insurance example, that condition is the death of the insured. The conditions in unemployment compensation are less drastic but more complex.

Those conditions fall into two categories. One relates to the circumstances of termination of the prior employment. Those circumstances being a matter of past action at a specified point in time, they ordinarily need be determined

only once, after which a *res judicata* status is accorded the determination. Cf. *Torres v. New York Department of Labor,* 321 F.Supp. 432 (D.C.S.D.N.Y. 1971). That category is not in issue in this case. Nor can determination of that question be determinative of eligibility, since a claimant has at that point fulfilled only part of the conditions precedent.

The second category deals with the claimant's activities during the period. Examples are found in Indiana Code of 1971, 22-4-14-3:

> "An unemployed individual shall be eligible to receive benefits with respect to any week only if he is physically and mentally able to work, is available for work and is found by the Division to be making an effort to secure work."

These issues, which are just as much conditions precedent as are the others, are also questions of fact and therefore can only be determined after the event. No human agency can accurately predict on December 1 whether a person then unemployed will meet these standards the next March 1. By that time, the person might be employed, ill, dead or otherwise no longer in the labor market. That agency will also be unable to determine in December whether the claimant might not refuse an offer of suitable work or otherwise disqualify himself in February. The law requires, therefore, that:

> "In addition to the foregoing determination of insured status by the Division, the deputy shall, throughout the benefit period, determine the claimant's eligibility with respect to each week . . ." Indiana Code of 1971, 22-4-17-2(d).

That determination is made weekly by one of two methods. Periodically, a full in-depth interview with a claims deputy will be scheduled. *Manual,* §§ 13725, 13731,

13732. In other weeks a more summary method is followed. The claimant is required to sign a printed statement that he has met all of the eligibility conditions. The claims-taker will ask certain questions and explore any obvious question of eligibility. *Manual*, § 13620, set out in full in the Appendix to the Appellants' Reply to Appellee's Motion to Affirm. Under either procedure, a voucher is executed at that time which is then used to process the payment of benefits. *Manual*, §§ 13600, 13660, 13661, 13670.

It is thus clear both as a matter of law and of fact that a new determination of eligibility is made each week which is effective only for that week. An initial determination of insured status does not foretell the future. Nor does a determination for one week determine eligibility for more than that week. A number of statements in the Brief of Appellee on these matters are submitted to be inaccurate.

COMPLIANCE WITH THE SOCIAL SECURITY ACT

At this point, the issues of the case can be considered. Little comment is needed beyond what was argued in the Brief of Appellant as to the statutory issues.

The first such issue is whether payment is made "when due." The simple fact is that there is never any determination in such a case that would make payment due. The only determination by the Division which affects that week is that no payment is due.

> "To have a property interest in a benefit a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, — U.S. —, 92 S.Ct. 2701, 2709 (1972).

Since the only determination made was adverse to him, the claimant has nothing on which to base his claim for payment pending a full hearing. The situation is in effect

a disallowance of an initial claim, in which case no right to immediate payment exists. *California Department of Human Resources Development v. Java,* 402 U.S. 121 (1971).

Mrs. Burney seeks to raise the issue in her brief of the statutory requirement of a fair hearing under 42 U.S.C. § 503(a)(3). While that provision was cited in Mrs. Burney's Complaint (App., p. 17), the issue was not decided by the District Court. It must be noted that the Secretary of Labor has treated this provision as calling for a post-determination hearing. 20 CFR Part 650. Thus, the validity of a federal regulation is being challenged. But the federal agency involved was not a party in the District Court and has taken no active part in this Court. This Court, then, should refuse to make an initial consideration of the claim.

The Brief of Appellee deals at some length with the supposed intent of Congress in enacting a system of unemployment compensation. These general statements of lofty purpose give a distorted view. Indeed, the statements tend to prove too much. The impression given is that the only requirements for payment of benefits are past covered employment and the fact of unemployment. The various requirements actually included in the Indiana law, which is typical, are set out above.

Congress was aware of such requirements when the program was enacted. Report No. 628, United States Senate Accompanying H.R. 7260, 74th Congress, 1st Session (Set out at Brief of Appellant, p. 14); See also Brief of Amici Curiae College/University Corporation et al. (employers' brief) pp. A9-A12. The Secretary of Labor is given authority, under 42 U.S.C. § 503 to refuse to approve state programs not complying with congressional intent, yet provisions such as that here under attack are found in almost

every state. See employers' brief, pp. A6-A8. The District of Columbia Unemployment Compensation Act, passed by that same Congress, contains similar provisions at §§ 46-310 and 46-311. It would certainly appear then that Congress has agreed with the concepts found in the Indiana law.

COMPLIANCE WITH THE DUE PROCESS REQUIREMENT

The constitutional issues remain to be considered. The Brief of Appellee deals at some length with the need of unemployed persons. Such need does not of itself create a constitutional right to relief. See *Board of Regents v. Roth*, supra. This Court there further stated:

> "Yet, while the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words 'liberty' and 'property' in the Due Process Clause of the Fourteenth Amendment must be given some meaning." 92 S.Ct. 2706.

and further:

> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus the welfare recipients in Goldberg v. Kelly [397 U.S. 254 (1970)], had a claim of entitlement to welfare benefits that was grounded in the statute defining eligibility for them." 92 S.Ct. at 2709.

It is the primary contention of the Division that the differences between the welfare program, involving continuing eligibility, and unemployment compensation, with its weekly determination of eligibility, makes *Goldberg* inapplicable.

The Brief of Appellee argues that similar requirements are placed on welfare recipients. Those requirements must be considered. It is first argued that welfare recipients undergo periodic eligibility reviews. That period, though, is every six months for AFDC and twelve months for other programs. That review, moreover, is not a condition precedent to continued payment of benefits.

> "The county department shall not discontinue assistance for the sole reason that the reinvestigation was not completed within the required period of time." *Indiana Public Assistance Manual,* XI-A-1.

Another duty is to inform the welfare department of any change of circumstances which might affect eligibility. This "duty" is a passive one indeed, not at all similar to those imposed on the claimant for unemployment compensation. No weekly reporting, or anything similar, is required.

The final duty is that part of the 1971 Amendments to the Social Security Act requiring certain welfare recipients to seek work or undergo job training. As of this date, no procedures have been instituted to enforce this obligation. Such an enforcement procedure might well be similar to that in this case, in which case *Goldberg* would no longer be applicable to that welfare program. Thus, the programs involved are substantially different.

No further discussion of the *Java* and *Torres* cases beyond that found in the Brief of Appellants is thought necessary. One further matter must be considered. That is the collection of statistics quoted at several points in the Brief of Appellee, both as to the statutory and due process arguments.

Two sets of statistics are used. One refers to the time necessary for a referee determination. Certainly, a speedy determination is desirable, but would hardly appear in itself to achieve the level of a constitutional requirement.

Moreover, these times vary from period to period, dependent upon work load, staff size and other factors. The statistics used by Mrs. Burney were taken from a period when the Division was understaffed. That situation has been remedied. Figures from the last four monthly reports show a quite different picture:

	Time Lapse—Filing to Decision			
	July, 1972	*August, 1972*	*September, 1972*	*October, 1972*
Total appeals	249	281	227	209
0-30 days	103	143	152	147
31-45 days	74	62	43	27
46-75 days	36	37	19	21
over 75 days	36	39	13	14

Temporary administrative difficulties within the Division would seem to be no reason for holding a statute unconstitutional, especially when those difficulties no longer exist. Of course, there can be no absolute certainty that the situation will continue to improve, but neither should serious deterioration be assumed.

Moreover, any constitutional question as to this would appear to be mooted by a change in the regulations of the Department of Labor which set time limitations to be read into 42 U.S.C. § 503. 20 CFR Part 650, published in 37 F.R. 16173.

The second group of statistics challenges the sufficiency of deputy determinations on the ground that close to 50 percent of appeals by claimants in the period of January-March 1972 resulted in reversal of the deputy determination. Other statistics not given, though, would show that in the same period over 40 percent of employer appeals from referees to the Review Board resulted in reversals. (Computed from monthly reports to the Department of Labor.)

Another weakness of the statistics is that they refer to all appeals, not only those on continued claims. No breakdown by both issue and result is given, but a breakdown by issues is available. During the period involved, approximately 77.5 percent of all appeals arose from determinations of issues arising from termination of the prior employment; about 12.5 percent involved continued-claim type issues; and about 10 percent could not be classified. The statistics, then, are not even relevant to the issue of this case. No showing of any constitutional deprivation appears.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be reversed.

Respectfully submitted,

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–1119

Indiana Employment Security Division et al., Appellants, *v.* Essie D. Burney

On Appeal from the United State District Court for the Northern District of Indiana.

[January 17, 1973]

PER CURIAM.

We noted probable jurisdiction in this case, 406 U. S. 956, to review the judgment of a three-judge district court, holding that Indiana's system of administering unemployment insurance was in conflict with § 303 (a)(1) of the Social Security Act, 42 U. S. C. § 503 (a)(1).[1] Before the three-judge court entered its injunction, Indiana's practice was to discontinue unemployment benefits upon a determination of ineligibility, that determination taking place without the benefit of a full hearing for the erstwhile beneficiary.

After several months of effort, however, the class representative in this litigation, Mrs. Burney, succeeded in obtaining a reversal of the initial determination of ineligibility.[2] She has now received full retroactive compensation.

[1] The three-judge court was convened pursuant to 28 U. S. C. §§ 2281, 2284, to consider the prayer for an injunction against enforcement of the Indiana statute, Ind. Ann. Stat. § 52–1542a (3) (Burns 1970 Supp.), on the grounds that it violated the appellee's right to due process under the Fourteenth Amendment. The District Court did not reach this issue.

[2] The District Court entered a temporary restraining order against the appellants on May 7, 1971. Presumably the appellee's payments

The full settlement of Mrs. Burney's financial claim raises the question whether there continues to be a case or controversy in this lawsuit. Though the appellee purports to represent a class of all present and future recipients of unemployment insurance, there are no named representatives of the class except Mrs. Burney, who has been paid. Cf. *Bailey* v. *Patterson,* 369 U. S. 31, 32–33. Accordingly, the judgment is vacated and the case is remanded to the District Court to consider whether it has become moot.

It is so ordered.

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were then restored pending the outcome of her hearing before a referee, which took place on July 1, 1971. On July 13, 1971, the referee affirmed the determination of ineligibility. Mrs. Burney then appealed to the Division Review Board. After the judgment and injunction were entered by the District Court, the Review Board reversed the referee and awarded payments to Mrs. Burney. This latter determination was unrelated to the injunction.

SUPREME COURT OF THE UNITED STATES

No. 71–1119

Indiana Employment Security Division et al., Appellants, *v.* Essie D. Burney	On Appeal from the United State District Court for the Northern District of Indiana.

[January 17, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

I consider the remand ordered by the Court to be pointless. The only issue in this case is the right of a recipient of unemployment insurance benefits to a full evidentiary hearing before those benefits are terminated as the result of an administrative determination of ineligibility. The Court evidently concludes that this action may be moot as to Mrs. Burney, since she has now received a full evidentiary hearing and settlement of her claim, and as to the affected class, since Mrs. Burney is its only named representative in this action. I think it clear on the record before us, however, that nothing has occurred at either the administrative or judicial level since Mrs. Burney entered this suit that would suffice to moot her claim or that of the class.

Mrs. Burney's benefits were suspended beginning the week of March 23, 1971. On April 2, 1971, some three weeks before Mrs. Burney sought leave to intervene in this action,[1] she invoked the existing Indiana appeal

[1] This action was originally brought to declare invalid the Indiana statutory provision that an unemployed individual found initially to be eligible by the Division would have his benefits suspended upon appeal by the employer of the eligibility determination. That issue was effectively resolved against the Division by this Court's

procedure, see Ind. Stat. Ann. § 52–1542a (e) (1964), now Ind. Stat. Ann. § 52–1542a (e) (Supp. 1972), and requested an administrative hearing. She received such a hearing on July 1, 1971, while this action was still pending in the District Court. Although the hearing referee affirmed the suspension order, on December 6, 1971, the Division Review Board reversed the referee and held that Mrs. Burney's benefits had been erroneously suspended. Meanwhile, on October 26, 1971, the District Court granted summary judgment in favor of Mrs. Burney and the affected class.

Certainly the full administrative hearing which Mrs. Burney received during the pendency of this case in the District Court cannot be considered to be an indication that Indiana has voluntarily chosen to provide henceforth the *pre*-termination hearing which Mrs. Burney claims is required under both § 303 (a)(1) of the Social Security Act, 42 U. S. C. § 503 (a)(1) and the Due Process Clause. So far as appears, the hearing afforded Mrs. Burney was nothing more than the *post*-termination hearing for which provision is already made in Indiana law.[2]

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decision in *California Department of Human Resources Development* v. *Java*, 402 U. S. 121 (1971), which was handed down while this case was pending in the District Court, and it is not presented on this appeal. On May 7, 1971, the District Court allowed Mrs. Burney to intervene in this action in order to raise the further issue whether a pre-termination hearing is necessary where the Division seeks to suspend payment of benefits because it has determined that a person who was *initially eligible* to receive unemployment benefits has *since* become ineligible.

[2] At the same time Mrs. Burney sought to intervene, she requested a temporary restraining order reinstating her benefits. On May 7, 1971, the District Court issued such an order directing that Mrs. Burney's benefits be reinstated and not be again suspended "without a prior, due process hearing." In light of the chronology of events in this case it appears that Mrs. Burney re-

Nor can I accept any suggestion that Mrs. Burney's attack upon appellants' failure to provide a pre-termination hearing may be moot merely because she has received a full post-termination hearing and settlement of her claim since entering this litigation.[3] A determination of mootness based on this line of reasoning would effectively bar the full and final litigation of whether a pre-termination hearing is legally required, while leaving Indiana free to continue to provide Mrs. Burney and other beneficiaries of unemployment insurance with only post-termination hearings.

It is, by now, clear that a claim is not moot if it is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911); see *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969). It is entirely possible that Mrs. Burney will, in the future, become employed and then once more become unemployed. If this action is deemed to be moot and the existing state procedure remains intact, she then may encounter the same problem of suspension of benefits without a prior hearing that she has encountered in this instance. And, inevitably, the post-termination administrative process will again be completed before

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ceived only the regular post-termination hearing for which Indiana law provides. But even if the July 1 hearing was the product of the temporary restraining order, such compliance with the court order would not moot this case. See, *e. g.*, *Bakery Sales Drivers Local Union No. 33* v. *Wagshal*, 333 U. S. 437, 442 (1948); *Dakota County* v. *Glidden*, 113 U. S. 222, 224, (1885).

[3] It particularly bears noting that in *California Department of Human Resources Development* v. *Java*, 402 U. S. 121, 123–124 (1971), which involved a related pre-termination hearing claim, see n. 1, *supra*, the Court never even suggested that there was any problem of mootness, although both appellees had received full post-termination administrative hearings during the pendency of the litigation.

final legal relief may be obtained as to the pre-termination hearing question. Indeed, this sequence of events might repeat itself any number of times for Mrs. Burney if the mere provision of the post-termination hearing and settlement of her particular claim were considered sufficient to moot the issue whether a pre-termination hearing is required. The principle that a federal court will not pass upon a moot controversy does not require us to set in motion such a litigious merry-go-round where, as here, there is a short-lived controversy of a potentially recurring character.

It is no answer that there are other beneficiaries of unemployment insurance whose benefits may be terminated in advance of a full hearing and who might therefore institute litigation concerning the timing issue. Such litigation can be expected to fare no better, or worse, in terms of problems of mootness, than this case. As with Mrs. Burney's claim, the post-termination administrative process will invariably be completed before a final adjudication is obtained. In fact, appellants indicate that the post-termination hearing procedure has been speeded up significantly since Mrs. Burney's administrative appeal was processed.[4]

It is true that the District Court entered an injunction ordering Indiana to provide pre-termination hearings, and that injunction is currently in effect since no stay has been entered. As a result, pre-termination hearings are presently being provided in Indiana.[5] But this certainly does not moot the case, for it is well established that compliance with a court order *pendente lite* does not moot the underlying controversy, see, *e. g.*, *Bakery Sales Drivers Local Union No. 33* v. *Wagshal*, 333 U. S. 437, 442 (1948); *Dakota County* v. *Glidden*, 113 U. S.

[4] See Reply Brief for Appellants 8.

[5] See Brief for Appellee 6.

222, 224 (1885). A determination of mootness would require that the decision below be vacated and the action dismissed. See, *e. g., SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403, 407 (1972); *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953). Under such circumstances, appellants would be "free to return to [their] old ways." *Ibid.* For a case to be moot it must be "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199, 203 (1968). In this case, appellants have hardly provided such assurance—as is evident from the very fact that this appeal was taken from the adverse decision below.

In my view, then, this case remains viable as to both Mrs. Burney and the affected class. Accordingly, I see no need for the remand ordered by the Court.[6] On the merits, I would affirm the judgment of the District Court in light of our decision in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970). See *Torres* v. *New York Department of Labor*, 405 U. S. 949 (1972) (statement of DOUGLAS, BRENNAN, and MARSHALL, JJ.).

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[6] I can see the purpose of a remand to a district court for consideration of possible mootness where the Court identifies disputed factual issues the resolution of which affects the continuing viability of the particular claim. See, *e. g., Johonson* v. *New York State Education Department*, — U. S. — (1972). But here the Court fails to identify any such factual issue. Indeed, there do not appear to be any factual issues in dispute as to the administrative developments subsequent to Mrs. Burney's intervention in this suit. Under such circumstances, this Court is as competent as a district court to resolve initially the issue of mootness, and in the past it has proceeded to do so, see, *e. g., SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403 (1972); *United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199, 202–204 (1968).